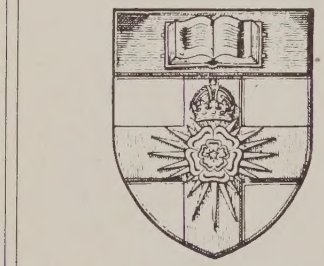
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

REFERENCE ONLY

346.4 MxWorth.



UNIVERSITY OF LONDON
LIBRARY

IRISH REPORTS 1894-

REPRINT 1976

Printed and Published
in Great Britain by
Professional Books Limited,
of Milton Trading Estate,
Milton, Abingdon, Oxon.

PROFESSIONAL BOOKS LIMITED

THE IRISH REPORTS.

VOL. II.—1900.

THE IRISH REPORTS,

PUBLISHED UNDER

THE CONTROL OF THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND:

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE COURT OF APPEAL,

THE HIGH COURT OF JUSTICE,

THE COURT FOR CROWN CASES RESERVED,

IN IRELAND,

AND

THE IRISH LAND COMMISSION.

EDITED BY

WILLIAM GREEN,

BARRISTER-AT-LAW.

1900.

VOL. II.

THE QUEEN'S BENCH DIVISION AND THE IRISH LAND COMMISSION.

DUBLIN:

PUBLISHED FOR THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND,

BY EDWARD PONSONBY,

116, GRAFTON STREET.

1900.

BIBL. LONDIN. UNIV.

DUBLIN:

PRINTED FOR THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND

At the University Press,

BY PONSONBY AND WELDRICK.

Lord Chancellor.

The Right Hon. Lord Ashbourne.

Lords Justices of Appeal.

The Right Hon. Gerald FitzGibbon.
The Right Hon. Samuel Walker.
The Right Hon. Hugh Holmes.

Queen's Bench Division.

The Right Hon. Lord O'Brien, L.C.J.
The Right Hon. Christopher Palles, C. B.
The Right Hon. William Drennan Andrews.
The Right Hon. William Moore Johnson.
The Right Hon. James Murphy.
The Right Hon. John George Gibson.
The Right Hon. D. H. Madden.
The Hon. Walter Boyd.
The Hon. William Kenny.
The Hon. Dunbar Plunket Barton.

Irish Land Commission.

The Hon. R. E. Meredith, *Judicial Commissioner.*
Frederick S. Wrench,
The Hon. Gerald FitzGerald, Q.C., } *Commissioners.*
S. J. Lynch,
Murrogh O'Brien,

Attorney-General.

The Right Hon. John Atkinson.

Solicitors-General.

Dunbar Plunket Barton, Q.C.
George Wright, Q.C.

[These Reports will be cited as follows :—[1900] 2 I. R.]

REPORTERS.

Court of Appeal,	Robert D. Murray, G. Y. Dixon,	Barristers-at-law.
Queen's Bench Division, and Court for Crown Cases Reserved,	A. E. R. Joynt, J. H. Pigot, John Linehan,	Barristers-at-law.
Queen's Bench Division (Probate),	William Lawson, R. W. Lucas,	Barristers-at-law.
Queen's Bench Division (Bankruptcy),	D. M'C. Mahony, John MacMahon,	Barristers-at-law.
Irish Land Commission,	William C. Stubbs,	Barrister-at-law.

TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

PAGE

Antrim Co. (Justices of), Reg. (Morell) *v.* 492

——————————,

—— (Rogers) *v.* 388

Antrim Union (Guardians of), Henry *v.* 547

Archbold, Tenant; Charters, Landlord, 262

Armagh Union (Guardians of) *v.* Bell, 371, 383

B.

Bannon *v.* Hanrahan, 455

Bell, Armagh Union (Guardians of) *v.* 371, 383

Borrowes and Local Government (Ireland) Act, 1898, sect. 5, *In re*, 593

Brady *v.* Warren, 632

Bray Township Commissioners, Dublin Corporation *v.* 88

Burton, Canavan *v.* 359, 370

Butler, *In re*, 153

C.

Canavan *v.* Burton, 359, 370

Caraher, Guinness *v.* 505

Charters, Landlord; Archbold, Tenant, 262

PAGE

Clarke, Reg. *v.* 304

Commissioners of Inland Revenue, Massereene and Ferrard (Viscount) *v.* 138

Components' Tube Co., Ltd., *v.* Naylor, 1

Cork Co. (Justices of), Reg. (Secretary of State for War) *v.* 105

Craig *v.* M'Cullagh and Baird, 136

Crowley *v.* O'Sullivan, 478

Cullen, Picton *v.* 612

D.

Devonshire (Duke of), Appellant; Drohan, Respondent, 161

—————————— *v.* Foot, 211

Drohan, Respondent; Devonshire (Duke of), Appellant, 161

Dublin Corporation *v.* Bray Township Commissioners, 88

E.

Elliott, *In re*, 439

Ennis Election Petition, *In re*; O'Loughlin and Others Petitioners; Scanlan, Respondent, 384

F.

PAGE
Fegan *v.* Meegan, 441
Fetherstonhaugh, Landlord; Gaffney, Tenant, 417, 422
Fitz Gerald, Appellant; Hosford, Respondent, 391
Foot, Devonshire (Duke of) *v.* 211

G.

Gaffney, Tenant; Fetherstonhaugh, Landlord, 417, 422
Gately *v.* Martin (H. and J., Limited), 269
Gorman *v.* Waterford and Limerick Railway Co., 341
Great Northern Railway Co., M'Evoy *v.* 325, 340
Greene, *In re*, 433
Guinness *v.* Caraher, 505

H.

Hanna *v.* Pollock, 664
Hanrahan, Bannon *v.* 455
Hawkes, Tenant; Magner, Landlord (No. 2), 465
Henry *v.* Antrim Union (Guardians of), 547
Holland, O'Connell *v.* 448
Hosford, Respondent; Fitz-Gerald, Appellant, 391

I.

Irish Land Commission *v.* O'Flaherty, 556
——— *v.* Ryan, 565

K.

Kyle, Peddie and others *v.* 265

L.

Leitrim (Chairman and Justices of) Reg. (Hamilton) *v.* 397
Levin *v.* O'Keeffe, 628, 631
Local Government (Ireland) Act, 1898, sect. 5 and Borrowes, *In re*, 593
Louth (Justices of), Reg. (Holywood) *v.* 714

M.

M. (an Arranging Debtor), *In re*, 415
M'Cullagh and Baird, Craig *v.* 136
M'Evoy *v.* Great Northern Railway Co., 325, 340
Magner, Tenant; Hawkes, Landlord (No. 2), 465
Mahony *v.* Waterford, Limerick and Western Railway Co., 273
Malone *v.* Ross, 586
Marti, *In re*, 259
Martin (H. and J., Limited), Gately *v.* 269
Massereene and Ferrard (Viscount) *v.* Commissioners of Inland Revenue, 138
Meegan, Fegan *v.* 441

N.

Naylor, Components Tube Co., Limited, *v.* 1

O.

O'Brien, Landlord; Ryan, Tenant, 539
O'Connell *v.* Holland, 448
O'Flaherty, Irish Land Commission *v.* 556
O'Grady *v.* Synan, 602, 610
O'Hara, *In re*, 232
O'Keeffe, Levin *v.* 628, 631
O'Leary *v.* Stack; In the Goods of Twomey, 560

PAGE

O'Loughlin and Others, Petitioners; Scanlan, Respondent; *In re* Ennis Election Petition, 384
O'Sullivan, Crowley *v.* 478
Owens *v.* Reg., 513

P.

Parkes, Spence *v.* 619
Peddie and Others *v.* Kyle, 265
Picton *v.* Cullen, 612
Pollock, Hanna *v.* 664

R.

Reg. (Morell) *v.* Antrim Co. (Justices of), 492
—— (Rogers) *v.* ——, 388
—— *v.* Clarke, 304
—— (Secretary of State for War), *v.* County Cork (Justices of), 105
—— (Hamilton) *v.* Leitrim (Chairman and Justices of), 397
—— Holywood *v.* Louth (Justices of), 714
——, Owens *v.* 513
—— (Drohan) *v.* Waterford Co. (Justices of), 307
—— (Brown) *v.* Wicklow County Council, 351
Ross, Malone *v.* 586
Ryan, Irish Land Commission *v.* 565
Ryan, Tenant; O'Brien, Landlord, 539

S.

Scanlan, Respondent; O'Loughlin and Others, Petitioners; *In re* Ennis Election Petition, 384
Spence *v.* Parkes, 619
Stack, O'Leary *v.*; In the Goods of Twomey, 560
Studdert, *In re*, 281, 400
Synan, O'Grady *v.* 602, 610

T.

Twomey, In the Goods of; O'Leary *v.* Stack, 560

W.

Warren, Brady *v.* 632
Waterford Co. (Justices of), Reg. (Drohan) *v.* 307
Waterford and Limerick Railway Co., Gorman *v.* 341
Waterford, Limerick and Western Railway Co., Mahony *v.* 273
Wicklow (Co. Council of), Reg. (Brown) *v.* 351

TABLE OF CASES CITED.

A.

PAGE

Aarons Reefs Co. *v.* Broadhurst, 28, 42
——— *v.* Twiss, 27, 28, 33, 41, 42, 43, 44, 49, 55, 59, 61, 72, 76, 79, 80
Acton *v.* Blundell, . . 332
Aldridge *v.* Great Western Railway Co., . . . 277, 279
Alexander *v.* Burke, . . 458
——— *v.* Shiel, . . 169
Alison, *In re*; Johnson *v.* Mounsey, . . 568, 570, 574
Ambrose *v.* Keohan, . . 607
Angus *v.* Clifford, . . . 82
——— *v.* Dalton, 666, 674, 696, 704, 706
Anon. (1 Vent. 295) . 636, 651
Arkwright *v.* Gell, 328, 331, 333, 672
——— *v.* Newbold, . . 50, 58
Ashbury Railway Carriage and Iron Co. *v.* Riche, . . 329
Athol *v.* Midland Great Western Railway Co. of Ireland, 329, 335
Atkinson, *In re*, . . 292
Attorney-General *v.* Beech, 142, 296
——— *v.* Dodington, 282, 283, 288, 290, 298, 299, 301, 302, 303, 400, 403, 404, 405, 410, 411, 413, 414
——— *v.* Great Eastern Railway Co., . . 330
——— *v.* Hay, . 283
——— *v.* Robertson, 293
——— *v.* Wood, 282, 291, 293, 296
Auld *v.* Glasgow Workingmen's Building Society, . . 526
Aynsley *v.* Glover, 696, 704, 705, 707
Ayr Harbour Trustees *v.* Oswald, ... 329, 331

B.

PAGE

Ballantyne *v.* M'Kinnon, 185, 608
Ballingall *v.* Menzies, . . 458
Banner, *Ex parte*, . . 569
Barnett *v.* Hickmott, . . 458
Barrs *v.* Jackson, . 569, 576
Bartlett *v.* Vinor, . . 365
Barton *v.* Fitzgerald, . . 364
Baxter *v.* Brown, . . 458
——— *v.* West, . . . 483
Beamish, *Re*, . . . 354
Beggan *v.* M'Donnell, 677, 680, 682, 683, 691, 693, 699, 705, 707
Bellcairn, The, . . . 585
Bensley *v.* Bignold, . . 365
Berkeley *v.* Thompson, . 622, 626
Berrington *v.* Scott, . . 292
Bird *v.* Adcock, . . . 260
Birkbeck *v.* Paget, . . 635, 660
Blades *v.* Higgs, . . 636, 643
Blake *v.* O'Kelly, . . . 610
Bland *v.* Delano, . . . 588
Boileau *v.* Rutlin, . . 574, 576
Bolland *v.* Waterford, Limerick & Western Railway Co., . 278
Booth *v.* Briscoe, . 266, 267
Boulston *v.* Hardy, 637, 638, 641, 644, 645, 659, 661
Bound *v.* Lawrence, . . . 714
Bradstreet *v.* Butler, . . . 272
Brassington *v.* Llewellyn, . 568
Bright *v.* Walker, 664, 665, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 691, 693, 694, 695, 696, 697, 699, 701, 704, 705, 707, 708, 709, 711
Briscoe *v.* Stephens, . . 223
Britain *v.* Rossiter, . 482, 489, 490
Brown *v.* Foot, . . . 396

PAGE
Bunting *v.* Sargent, . . 568
Burden *v.* Barkus, . . . 483
Bushfield, *In re*, . . 620, 621
Butler *v.* Bradstreet, . . 271
Bwlch-y-Plwm Lead Mining Co. *v.* Baynes, ... 52

C.

Caddick *v.* Skidmore, . . 482
Carter *v.* James, . . . 585
Cassidy *v.* Moore, . . . 168
Cato *v.* Thompson, . . . 364
Central Railway Company of Venezuela *v.* Kisch, 27, 39, 40, 42, 44, 45, 46, 52, 55, 56, 59, 80
Charlton *v.* Morris, . . 449
Charman *v.* South Eastern Railway Co., ... 524
Chasemore *v.* Richards, 328, 331, 332
Chisholm *v.* Doulton, . . 394
Clancy *v.* Byrne, . . 682, 683
Cliff, *In re*; Edwards *v.* Brown, 620
Clifford *v.* Reilly, . . . 367
Clutterbuck *v.* Taylor, . 458, 462
Coggs *v.* Bernard, . . . 504
Colonial Bank *v.* Whinney, 154, 158, 159
Commercial Gas Co. *v.* Scott, . 260
Commissioners of Inland Revenue *v.* Angus, . . 143
Commissioners of Police *v.* Cartman, ... 393
Compagnie Générale d'Eaux Minérales et de Bains de Mer, *In re*, ... 627
Cook *v.* North Metropolitan Tramways Co., . . 715, 716
Cooke *v.* Benbow, . . . 484
Cooper *v.* Reilly, . . . 613
——— *v.* Slade, . . . 394
Coulter *v.* Martin . . 168, 176
Cowan, *Ex parte*. . . . 225
Cox *v.* Burbidge, . . . 646
Credits Gerundeuse, Limited, *v.* Van Weede, . . 620, 626
Criglington *v.* Gallagher, . 449
Crispin *v.* Doglioni, . . 563
Cruise *v.* Annan, . . . 458
Cullen *v.* Jackson, . . 507, 508
Curran *v.* Midland Great Western Company of Ireland, . 279

D.

Dabbs *v.* Humphrey, . . 588
Dale *v.* Hamilton, . . 491

PAGE
Dalton *v.* Angus, . 271, 272, 331
Dartford Rural District Council *v.* Bexley Heath Railway Co., 210
Davies *v.* Chatham, &c., Building Society, . . . 533
——— *v.* Powell, . 636, 649, 657
Dearle *v.* Hall, . . . 159
Deeble *v.* Linehan, 673, 674, 682, 683, 684, 687, 694, 698, 699, 700, 701, 702, 704, 707, 711
Devonshire, *In re*, . 164, 186, 213
Devonshire *v.* Foot, 164, 168, 169, 171, 173, 174, 175, 181, 182, 183, 184, 186, 187, 188, 191, 192, 197, 206, 207, 322
Dewell *v.* Sanders, . . 645
Dillon, *Re*, ... 497
Donnelly *v.* Graham, . . 449
Donoughmore *v.* Forrest, 360, 365
Doody *v.* Nolan, . 362, 363, 365, 369
Dovaston *v.* Payne, . 344, 380
Duberly *v.* Day, . . . 443
Dudley Gas Co. *v.* Warmington, 260
Dunn *v.* Reg., . . . 536
Dunne (Assignees of) *v.* Hibernian Joint Stock Co., . . 159

E.

Ebrard *v.* Gassier, . . 562
Egerly's Case, . . . 372
Elliott, *In re*, . . 242, 243
England *v.* Curling, 484, 487, 488
Evelyn *v.* Harris, . . 584
Ewart *v.* Belfast Poor Law Guardians, . . . 332

F.

Fahey *v.* Dwyer, . 681, 682, 709
Farrer *v.* Nelson . 635, 644, 661
Fawcett *v.* York & North Midland Railway Co., . 344, 350
Filburn *v.* People's Palace and Aquarium, . . . 637
Fisher *v.* Bridges, . . . 365
Fitzgerald *v.* Portarlington . 606
Flarty *v.* Odlum, . . . 613
Flitters *v.* Allfrey, . 570, 580
Fogarty *v.* Shanahan, . 362, 365
Ford *v.* Hart, . . . 449
—— *v.* Tynte, 636, 637, 649, 658
Forster *v.* London, Chatham & Dover Railway Co., . . 330

G.

PAGE
Galer v. Rawson, . . 375, 377
Galgay v. Great Southern & Western Railway Co., . 332
Gallagher v. Great Western Railway Co., . . . 277
Gas Light and Coke Co. v. St. Mary Abbott's Kensington (Vestry of), . . 377, 380
Gayford v. Moffatt, . . 699
Gifford, *Ex parte*, . . 608
Gillman v. Murphy, . . 365
Gloag, *Re*, ... 364
Gonty & Manchester, Sheffield & Lincolnshire Railway Co., *Re*, 330
Gordon, *Ex parte*, . . . 714
Gordon v. Street, . . . 630
Goucher v. Clayton, . . 569
Gould v. Gapper, . . 175, 227
Gover's Case, 49, 50, 53, 54, 55, 56, 57
Graham v. Furber, . . . 154
Grainger v. Aynsley, . . 714
Grand Junction Canal Co. v. Petty, ... 329
Gray v. Smith, ... 482
Graydon v. Trustees of Morgan's Charity, ... 473
Great Northern Railway Co. v. M'Carthy, . . . 278
Great Western Railway Co. v. May, ... 330
Greathead v. Bromley, . . 610
Greatrex v. Hayward, . . 672
Greenham v. Gray, . . 483
Grehan, *In re*, . . 154, 159
Grenfell v. Dean of Windsor, . 613
Griffin v. Taylor, . . . 473

H.

Hadfield's Case, . . . 177
Hadgett v. Inland Revenue Commissioners, . . 142, 143
Hall v. City of London Brewery Co., ... 364
Hallack's Case, . . . 312
Handford & Co., *In re*; *Ex parte*, Handford, . . 440
Hannam v. Mockett, 636, 643, 659
Hanks v. Cribbin, . . 674
Hasson v. Chambers, . . 458
Haynes v. Great Western Railway Co., ... 278
Heath v. Weaverham Overseers, 569
Hemming v. Blanton, . 568, 569
Henderson v. Henderson, . 610
——— v. Lacon . 27, 41, 80
——— v. Stevenson, . . 278

PAGE
Hewett, *In re*; *Ex parte*, Levene, 440
Hibbert v. Hibbert, . 487, 488
Hilton v. Green, 635, 637, 644, 660
Hinsley v. Wilkinson, . . 659
Hoban, *Re*, ... 443
Hobbs v. Wade, . . . 568
Holland v. Hagan, . . 449, 451
Holmes v. Millage, . . 613, 618
Hopkins, *Ex parte*, . . . 240
Hosford v. Mackey, 391, 393, 394, 395, 396
Houldsworth v. City of Glasgow Bank, . . 37, 44, 49, 50, 51
Houston v. Sligo, . . 570, 575
Howell v. Richards, . . 364
Howlett v. Tarte, 569, 575, 576, 585
Hudson v. Louth, . . . 458
Humphries v. Brogden, . . 271
Hunt v. Great Northern Railway Co., ... 714

I.

Irish Land Commission v. Grant, 569
——————— v. Junkin, 570, 578, 579

J.

J. L., *In re*, ... 416
Jackson v. Turquand, . . 44, 48
Jeffrey v. St. Pancras' Vestry, 373
Jenkins v. Robertson, . 570, 574
Jinks v. Edwards, . . . 363
Jones v. Festiniog Railway Co., 378
Jones (Trustees of) v. Gittins, . 311
Jury, *Re*, ... 499

K.

Karberg's Case, . . . 26
Kempston v. Butler, . . 271
Kenna v. Nugent, . . . 570
Kent v. Midland Railway Co., 279, 280
Kibble v. Fairthorne, . . 568
King, *Re*, ... 126
Kingston's (Duchess of) Case, 205, 576
Kronheim v. Johnson, . . 149
Kusel v. Watson, . . . 126

L.

Lambert v. Bassett, . . 561
Langmead v. Maple, . . 610
Latimer v. Official Co-operative Society (Limited), . . 271

PAGE
Lavery *v.* Pursell, . . 483
Laws, *Re*, ... 129
Lax Weir Case, 169, 178, 179, 180, 181, 182, 183, 187, 191, 192, 201, 206, 207, 230
Lemaitre *v.* Davis, . 271, 272
Leonard *v.* Taylor, . . 364
Levin *v.* Ribton, . . . 507
Lincoln *v.* Wright, . . . 484
Local Government Board, *In re*; *Ex parte* Commissioners of Kingstown, . . . 100
London (Mayor, &c., of) *v.* Cox, 226, 310, 322
Love *v.* Taylor, . . 708, 709
Lowe *v.* Carpenter, . . . 696
Lucas *v.* Harris, . . . 613
Luscombe *v.* Great Western Railway Co., . . 344, 350
Lutton *v.* Thompson, . 168, 176
Lynes, *In re*; *Ex parte* Lester & Co., ... 440

M.

M'Carron *v.* Chambers, . 449, 450
M'Carthy *v.* Goold, . . 613
——— *v.* South Dublin Union (Guardians of), . . . 549
M'Cracken *v.* Campbell, . . 621
M'Kelvey *v.* Cole-Hamilton, 419, 420, 423, 424, 429
M'Manus *v.* Cooke, . 483, 490
M'Neill *v.* Reid, . . . 483
Maddison *v.* Alderson, 482, 489, 490, 491
Magner *v.* Hawkes, 473, 474, 475, 478
Maguire *v.* King, . . 419, 423
Malet's Trusts, . . . 154
Mallocke *v.* Eastly, . . 636
Manchester, Sheffield & Lincoln Railway Co., *v.* Wallis, 344, 348, 349, 350
Manning *v.* Mullins, . 613, 617
Marsden *v.* Wardle, . . 227
Matson *v.* Baird, . 343, 348, 349
May *v.* Burdett, . . . 651
Mayo Presentments, *Re*, . 352
Metropolitan Asylum District Board *v.* Hill, . . 377, 382
Metropolitan District Railway Co. *v.* Sharpe, . . . 117
Meyler and others, Appellants; Metcalfe, Respondent, . 458
Micklethwait, *Re*, . . 142
Mirams, *Re*, ... 613
Molony *v.* Cruise, . . . 613
Monyhan's Case, . . . 458

PAGE
Morgan *v.* Abergavenny, 636, 637, 649, 650, 657, 658
——— *v.* London General Omnibus Co., . . 715, 716
Morphett *v.* Jones, . . . 490
Muir *v.* Hore, . . . 320
Mulliner *v.* Midland Railway Company, . . 329

N.

Nagle & Hollis *v.* Ahern, . 143
National Exchange Bank of Glasgow *v.* Drew, . . 47
Nelson *v.* Headfort, 420, 424, 427, 428, 430, 431, 432, 433
New Brunswick and Canada Railway Co. *v.* Conybeare, 46, 47, 48
——— *v.* Muggeridge, 26, 39, 41, 42, 43, 44, 46, 55, 56, 59, 80
Newman *v.* Jones, . . 394
New Sombrero Phosphate Co. *v.* Erlanger, 50, 53, 56, 59, 63, 67, 68, 69, 70, 71, 81
Norton, Tenant; M'Donnell, Landlord, ... 544

O.

Oakes *v.* Turquand, . 40, 50, 52
O'Kane *v.* Burns, . . 360, 365
——— *v.* O'Kane, 683, 699, 710, 712
O'Loghlen, *Ex parte*, . . 622
O'Loghlen *v.* O'Callaghan, 604, 606, 609, 610
Onslow *v.* Commissioners of Inland Revenue, . . . 149
Outram *v.* Morewood, . 570, 584
Oxley *v.* James, . . . 122

P.

Page *v.* Midland Railway Co., . 364
Paget *v.* Birkbeck, . . 635, 660
Palmer *v.* Newell, . . . 550
Parker *v.* Alder, . . . 396
Partington *v.* Attorney-General, 150
Payne *v.* Brecon (Mayor of), . 365
Peek *v.* Derry, ... 82
——— *v.* Gurney, . . 50, 53, 58
Pepe *v.* City and Suburban Building Society, . . 526, 533
Peyton *v.* Gilmartin, . 117, 122
Phillips *v.* Innes, . . . 714
Pollard *v.* West, . . . 169

PAGE

Powell v. Butler, . . . 330
——— v. Fall, 375, 376, 377, 378, 382
——— v. Guest, . . . 449
——— v. Heffernan, . . 36
Pratt v. Gormanstown, . 473, 474
Pugh v. Heath, . . . 579
Pulsford v. Richards, . . 50, 51

R.

R. (Moore) v. Abbott, 111, 117, 119, 128, 130, 131
— (Lambe) v. Armagh (Justices of), 493, 496, 497, 498, 503
— v. Belfast (Mayor of), . 458
— v. Bent, . . . 305, 306
— v. Bishop, ... 394
— r. Bolton, ... 499
— v. Bridgewater (Mayor of), 353
— v. Brosnan, . . . 312
— v. Carmarthen (Mayor of), . 353
— v. Cheafor, . . . 645
— v. Chittenden, . . . 373
— (Norcott) v. Cork (Justices of), 607
— (Campbell) v. Donegal (Justices of), . . . 399
— (Ellis) v. Dublin (Justices of), 395
— (Clitheroe) v. Dublin (Recorder of), . . . 501
— (Cox) v. Dublin (Recorder of) 493, 496, 497, 498, 499, 501, 503
— v. Faulkner, . . . 597
— (Gilbey) v. Fermanagh (Justices of), . . 389, 390
— (Baxter) v. Great Northern Railway Co., . 117, 120
— v. Gyngall, . 239, 240, 242, 243
— v. Hartington, . . 570, 574
— v. Hutchings, . . 606, 608
— (Coghlan) v. Inspectors of Irish Fisheries, . 169, 531
— v. Johnston, . . . 223
— (Jones) v. Kerry (Justices of), 497
— v. Leake, ... 330
— v. Lightfoot, . . . 622
— (O'Grady) r. Limerick (Justices of), . . . 605
— r. Local Government Board, 353
— v. London Poor Law Board, 353
— r. Martin, ... 597
— (Metge) r. Meath (Justices of), 605, 606, 607, 608, 609
— v. Mitchell, . . . 449
— r. Norwich (Mayor of), . 353
— r. Oxfordshire (Justices of), 397, 399
— r. Pease, ... 378
— r. Pembliton, . . 597, 600
— r. Pitt, ... 306

PAGE

R. v. Russell, . . . 312
— (Smith) v. St. George, Southwark (Vestry of), . . 549
— v. Sankey, ... 305
— v. Smith, ... 260
— v. Staffordshire (Justices of) 389
— v. Stephens, . . 393, 396
— v. Stone, . . . 124, 125
— v. Sullivan, . . . 312
— v. Twiss, ... 312
— v. Wall, ... 260
— v. Welch, ... 597
Rameshur Pershad Narain Singh v. Koonj Bahari Pattuk, . 672
Ranger v. Great Western Railway Co., ... 47
Redgrave v. Hurd . . 26
Redmond v. Mooney, . . 562
Redondo v. Chaytor, . . 562
Richards v. Rose, . . . 271
Richardson v. Mellish, . 93, 104
Ricketts v. East and West India Docks, &c., Railway Co., ... 344
Right r. Darby, . . . 125
Roberts v. Plant, . . . 507
Robinson v. Jenkins . . 159
Robson v. Robson, . . . 561
Rochfort v. Somers, . 507, 508
Rock Portland Cement Co. v. Wilson, ... 483
Rylands v. Fletcher, . 637, 651

S.

Sanders v. Sanders, . 568, 569
Satchwell v. Clerke, . . 507
Scott v. Rayment, . 483, 488
Seaton v. Clark, . . . 507
Seddon v. Senate, . . . 363
Sewell v. Jones, . . 310, 311
Shackell v. West, 312, 315, 320, 322
Sheffield Water Works Co. v. Bingham, . . 93, 97
Sherras v. De Rutzen, . . 396
Simpson v. Wilkinson, . . 458
Sintzenack v. Lucas, . . 570
Six Carpenters' Case, . . 504
Sixth West Kent Building Society v. Hills, . 526, 534
Skipton Industrial Society r. Prince, . . . 311, 312
Smith, *Ex parte*, . . . 154
Smith v. Compton, . . . 564
——— v. Darlow, . . . 588
——— v. Midland Railway Co., 278
Smurthwaite v. Hannay, 266, 267

PAGE

Solomon *v.* Master, &c., of Vintners, ... 271
Somerset *v.* Wade, . . . 394
South American and Mexican Co., *In re*; *Ex parte* Bank of England, . . 574, 585
Spencer *v.* Tedcastle, . 473, 474
Staffordshire, &c., Canal Co. *v.* Birmingham Canal Co., . 331
Stansfield *v.* Hobson, . . 569
Star *v.* Rookesby, . . . 651
Steevens *v.* Great Western Railway Co., ... 278
Stevenson, *In re*, . . . 154
——— *v.* O'Neill, 168, 311, 320
Stribling *v.* Halse, . 458, 459
Strohmenger *v.* Finsbury Building Society, . . 526, 534
Stuckey's Settlement, . . 143
Sturla *v.* Freccia, ... 103
Sunk Island Turnpike Road (Trustees of) *v.* Patrington, 346
Sutton *v.* Moodey, . 635, 637
Swans, The Case of, . . 636
Syers *v.* Metropolitan Board of Works, ... 115

T.

Tambisco *v.* Pacifico, . . 563
Tapling *v.* Jones, . . 681, 687
Tennent *v.* Neill, . . . 711
Thompson *v.* Ingham, 226, 227, 311
Timmons *v.* Hewitt, 665, 673, 681, 683, 691, 692, 699, 700, 707, 709, 710, 713
Todd *v.* M'Keever, . 588, 591
Trower *v.* Chadwick, . . 271
Tunbridge (Mayor of) *v.* Baird, 379
Turner *v.* Harvey, . . 61
——— *v.* South Eastern Railway Co., ... 278
Twycross *v.* Grant, . . . 50

U.

Unkles *v.* Attorney-General, . 318

V.

PAGE

Vaughan *v.* Taff Railway Co., . 378

W.

Wallace *v.* Borrie, . . . 458
Walters *v.* Morgan, . . 61
Ward *v.* Stevenson, . . 260
Watkins *v.* Reddin, . . 373
—— *v.* Rymbill, . . . 278
Watt *v.* M'Guire, . . . 451
Weir *v.* Torney, . . . 125
Wells *v.* Foster, . . . 613
Western Bank of Scotland *v.* Addie, ... 38, 52
Westropp *v.* Commissioners of Public Works, . . . 172
Wheaton *v.* Maple, . . 698, 707
White *v.* Great Western Railway Co., ... 278
Williams *v.* Burrell, . . 364
Wilson *v.* Moy Fishery Co., . 169
——— *v.* Stanley, 664, 675, 679, 680, 695, 708
Wood *v.* Waud, . . 328, 672
Woodgate *v.* Great Western Railway Co., . . . 278
Wright *v.* Tracey, 117, 121, 122, 125
——— *v.* Williams, 676, 678, 679
Wyatt *v.* Great Western Railway Co., . . . 344, 348

Y.

Yarmouth *v.* France,
Yates *v.* Meehan, . . . 588
Young *v.* Hope, ... 154

Z.

Zunz *v.* South-Eastern Railway Co., ... 278, 279

MEMORANDA.

During the Hilary Sittings, 1900, Dunbar Plunket Barton, Esq., Q.C., Her Majesty's Solicitor-General, was appointed a Justice of the Queen's Bench Division of the High Court of Justice in Ireland, and George Wright, Esq., Q.C., was appointed Solicitor-General.

CORRIGENDUM.

Page 651, note (4) *for* "2" *read* "3."

CASES

DETERMINED BY

THE QUEEN'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND BY

THE IRISH LAND COMMISSION,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL,

AND BY

THE COURT FOR CROWN CASES RESERVED.

1900.

THE COMPONENTS TUBE COMPANY, LIMITED *v.* NAYLOR (1).

(1897. No. 6456.)

Q. B. Div. 1898.

June 20, 21, 22, 23, 27, 28; Nov. 8.

Company—Promoters—Prospectus—Fraud—Misrepresentation and suppression of fact—Companies Act, 1867, *sect.* 38—*Underwriting—Evidence.*

Where a person subscribes for shares in a Company upon the faith of a prospectus in which the promoters of that Company have as well made actual misrepresentations of material facts that were false to their knowledge as suppressed material facts that were within their knowledge, such person, if he takes no benefit under the contract, and repudiates within a reasonable time after he becomes aware of the fraud, can successfully rely on the fraud of the promoters as a defence to an action by the Company for calls, can rescind his contract, and can recover all moneys paid in respect of the shares subscribed for by him.

(1) Before Sir Peter O'Brien, L.C.J., Palles, C.B., and Madden, J.

Q. B. Div. 1898.

COMPONENTS TUBE CO. *v.* NAYLOR.

The omission in a prospectus of the names of the real vendors of the undertaking: and the employment, to conceal their identity, of a nominee as the ostensible vendor, may, if misleading, amount to such fraud as will vitiate the contract. So may also the omission to state that money was to be spent in underwriting.

The measure of the obligation of disclosure, in a Company's prospectus, discussed. Observations on Lindley on Company Law (5th ed.), p. 70.

NEW TRIAL MOTION. This action, tried before Mr. Justice Gibson and a special jury of the city of Dublin, which occupied seven days in the hearing, ending the 3rd May, 1898, was brought by the plaintiff Company against the defendant, an allottee of shares, for a balance due for calls on 100 shares allotted to him, and interest thereon. The defence was based on misrepresentation and fraud in the prospectus of the Company, with a plea of repudiation within a reasonable time, and a counterclaim for rescission of the contract to take the shares, for rectification of the register, and for the return of the amount (£17 10*s.*, application money), paid by the defendant in respect of the shares taken.

The prospectus of the plaintiff Company, dated the 30th January, 1897, was as follows:—

The List of Applications will OPEN *on* MONDAY, *the* 1ST FEBRUARY, *and* CLOSE *on or before* WEDNESDAY, *the* 3RD *of* FEBRUARY, 1897, *for London, and on or before the following day for Country.*

THE COMPONENTS TUBE COMPANY, LIMITED.

INCORPORATED UNDER THE COMPANIES ACTS, 1862 TO 1893.

CAPITAL, ... £150,000,

IN ORDINARY SHARES OF £1 EACH,

Payable:—2*s.* 6*d.* on Application; 7*s.* 6*d.* on Allotment; Balance, 10*s.*, on 1st March.

Directors:

*HARVEY DU CROS, Junr., Metchley House, Edgbaston, Birmingham, (Managing Director, Cycle Components Manufacturing Company, Limited).

*FREDERICK FABER MAC CABE, M.B., Belleville, Donnybrook, Dublin (Director, Singer Cycle Company, Limited).

* Will join the Board after Allotment.

RICHARD JAMES MFCREDY, Gortmore, Dundrum, Co. Dublin (ex-Director, Pneumatic Tyre Company, Limited),

CHARLES SANGSTER, Bristol Road, Edgbaston, Birmingham (Director, Cycle Components Manufacturing Company, Limited).

ALEXIS M. DE BECK, St. Joseph's, Edgbaston, Birmingham (Managing Director, Singer Cycle Company (Russia), Limited).

BENJAMIN B. TUKE, Coventry (Director Austral Cycle Agency, Limited).

Bankers:

LLOYDS BANK, LIMITED, 222, Strand, London; and all other Branches.

NATIONAL BANK, LIMITED, College Green, Dublin, and all Country Branches.

Solicitor:

JOHN B. PURCHASE, 11, Queen Victoria-street, London, E.C.

Brokers:

London—BASIL MONTGOMERY & Co., 19, Throgmorton Avenue, E.C., and Stock Exchange.

Birmingham—W. & F. CUTHBERT, 103, Colmore-row, and Stock Exchange.

Dublin—DANIEL D. BULGER, 16, College-green, and Stock Exchange.

Limerick—THOMAS MCSWINEY, George's-street, Limerick.

Auditors:

FELTON & WALKER, Chartered Accountants, 5, Waterloo-street, Birmingham.

Secretary (pro tem.):

CHARLES FREAKE.

Offices (pro. tem.):

5, Waterloo-street, Birmingham.

Registered Offices:

The Works, Bournbrook, Birmingham.

PROSPECTUS.

This Company has been formed to acquire, carry on, and develop the well-known profitable and extending Tube manufacturing business carried on by The Cycle Components Manufacturing Company, Limited, at Bournbrook, Birmingham. This business was established by Mr. James Hudson in 1882, and carried on by him till 1892, when it was converted into a Company under the title of Hudson & Company, Limited, and successfully carried on by that Company till taken over by The Cycle Components Manufacturing Company, Limited, in 1894.

In dealing with the acquisition of Hudson & Co., Limited, the Prospectus of The Cycle Components Manufacturing Company, Limited, said:—"It would be difficult to exaggerate the importance of this purchase in view of

Q. B. Div. 1898.

COMPONENTS TUBE CO. *v.* NAYLOR.

the improvements contemplated and the exceptional facilities of which the amalgamation has obtained control. This Company has hitherto depended almost exclusively upon the demands of the cycle trade for tubing; but it is now intended to develop other branches of the tube trade, such as boiler tubes, tubes for gas conveyance, tubular shafting and a multitude of other articles which are made from weldless steel tube."

The manufacture of weldless tubing has become such an important feature of businesses, other than the cycle industry, that it is desirable that a separate Company should be formed to work and extend this important and long established business, which, under the style of Hudson & Co., Limited, and later as a branch of The Cycle Components Manufacturing Co., Limited, has maintained a great reputation for tubing of the highest grade.

Since the date of sale of this branch of the business by The Cycle Components Manufacturing Company, Limited, contracts for the alteration and extension of the machinery and plant are being entered into at a **cost of £20,000**, which when complete will be capable of increasing the output from the present figure of 35,000 to about 100,000 feet per week.

This sum has been guaranteed by the Vendor out of the purchase moneys.

An additional **£20,000** will be reserved for **working capital**, and will be provided out of the first subscriptions to the capital of the Company.

The Company will thus be strengthened by the addition of **£40,000 of fresh capital**, and the Directors claim that this sum will place the Company in the forefront of the tube trade and enable it to compete most successfully with any other concern.

Orders for tubing at remunerative prices have been received from the following Companies :—

Singer Cycle Co., Ltd.	Riley Cycle Co., Ltd.
Swift Cycle Co., Ltd.	Allday & Onions Engineering Co., Ltd.
Birmingham Small Arms, Ltd.	Raglan Cycle and Anti-Friction Ball Co., Ltd.
Triumph Cycle Co., Ltd.	Fulwell Cycle Co., Ltd.
Bayliss Thomas, Ltd.	Tyne Cycle Mfg. Syndicate, Ltd.
Thomas Smyth & Sons, Ltd.	B. F. Williams, Wolverhampton.
New Buckingham & Adams Cycle Co.	

In addition to these Orders the Cycle Components Manufacturing Company, Limited, has undertaken to take the whole of the balance of the output for the current season, after all orders received by the Company have been satisfied.

The Cycle Components Manufacturing Company, Limited, one of the largest consumers of Weldless Steel Tube, has also undertaken to purchase, at remunerative prices to this Company, its full requirements for the subsequent two years.

It will thus be seen that the Company starts under most favourable and exceptional circumstances. In addition to its already large *clientèle*, new and important markets are being exploited.

It is also contemplated to lay down plant for the drawing of aluminium tubes, for which there is an increasing demand. The Directors anticipate that the next development in cycle and other light vehicle construction will be in this direction.

The works are situated alongside the works of the Cycle Components Manufacturing Company, Limited, at Bournbrook, within easy reach of the centre of the city of Birmingham. Important railway and canal communication adjoins the premises. The property comprises an area of about 9040 square yards, and is held under lease for 21 years from the Cycle Components Manufacturing Company, Limited, at an annual rental of £400, with the option of renewal or purchase on very favourable terms.

The business will be taken over as a going concern as from the 1st September, 1896, and all profits accruing from that date will belong to the Company.

The purchase price has been fixed by the Vendor at £130,000, out of which he provides the £20,000 above-mentioned for alteration and extension of the plant and machinery. The Vendor undertakes to accept payment of the purchase-money in cash or shares at the option of the Directors, but he stipulates that he may subscribe for and require the Directors to allot to him at least a third of the capital.

The Company has been fortunate in securing the valuable services of Mr. Harvey Du Cros, junior, who has undertaken to give every assistance in his power, and to at all times place the benefit of his experience at the disposal of the Directorate. The Vendor fully recognising the great importance of Mr. Du Cros' experience, has, at his own expense, entered into a contract with Mr. Du Cros, securing his services, as above, to the Company.

Mr. Charles Sangster, who has been so prominently connected with the economic and energetic management of the Cycle Components Manufacturing Company as Works Manager, is taking a seat on the Board. This ensures a continuance of the same energetic supervision.

Mr. Harvey Du Cros, junior, having made an agreement with the Vendor, will receive no payment beyond the ordinary fees to each Director. Mr. Chas. Sangster, whose services might easily be valued at a higher figure, is also content to take only the ordinary Director's fees. The Company is therefore saved very heavy salaries which would otherwise have been incurred.

The following contracts have been entered into, viz.:—

(1) Dated the 1st day of October, 1896, between the Cycle Components Manufacturing Company, Limited, of the one part, and Ernest Terah Hooley, of the other part.

(2) Dated the 27th day of January, 1897, between Ernest Terah Hooley, of the one part, and William Henry Weekes, of the other part.

(3) Dated the 28th day of January, 1897, between William Henry Weekes, of the one part, and Ernest Piercy, as Trustee for and on behalf of the Company, of the other part.

Q. B. Div. 1898.

COMPONENTS TUBE CO. v. NAYLOR.

(4) Dated the 27th day of January, 1897, between William Henry Weekes, of the one part, and Harvey Du Cros, junior, of the other part.

(5) Dated the 27th day of January, 1897, between the Cycle Components Manufacturing Company, Limited, of the one part, and the said Ernest Piercy, of the other part.

The Vendor will pay all expenses up to and including the final allotment of shares.

There may be also other contracts, including certain trade contracts, particulars of which, for obvious reasons, the Directors deem it inadvisable to specify, relating to the formation of the Company, and subscriptions to the capital and otherwise, which may technically fall within Section 38 of the Companies Acts, 1867. Subscribers will be held to have had notice of all these contracts, and to have waived all right to be supplied with particulars of such contracts, and to have agreed with the Company as Trustee for the Directors and other persons liable not to make any claim whatsoever, or to take any proceedings under the said section in respect of any non-compliance therewith.

Application for a special settlement and quotation will be made in due course.

Applications for shares should be made on the forms enclosed, and forwarded to the bankers of the Company, with the amount of the deposit.

If no allotment is made the deposit will be returned in full, and where the number of shares allotted is less than the number applied for, the balance will be applied towards payment due on allotment, and any excess will be returned to the applicant.

Copies of the Prospectus, with Forms of Application for Shares, can be obtained at the offices of the Company, or from their bankers, brokers, or solicitors.

The Memorandum and Articles of Association, and contracts specified above, can be seen at the offices of the solicitor to the Company.

30*th January*, 1897.

At the trial, H. B. Starmer (the Secretary of the plaintiff Company), J. B. Purchase (their solicitor), R. J. Mecredy (a director), Harvey Du Cros, junior (a director), and Charles Sangster (a director), were the principal witnesses called and examined for the plaintiffs. Mecredy's good faith was not impugned at the trial. For the defence, F. F. Mac Cabe (a director), D. D. Bulger (the Dublin stockbroker of the Company), and the defendant J. H. Naylor, were the principal witnesses examined. Mr. E. T. Hooley and Mr. Harvey Du Cros, senior, were called on subpœna for the defendant, but did not appear. The evidence was in many respects of a conflicting nature (1).

(1) The references in brackets are to the pages of the print of the learned Judge's report.

In addition to the oral evidence, a large mass of documents was also produced—including the minute-book of the plaintiff Company; the minute-book, and reports, and balance-sheets for the year 1896 of the Cycle Components Manufacturing Company, Limited; drafts of the prospectus, the contracts referred to in the prospectus, and counsel's drafts of same; some of the correspondence between the promoters as well prior as subsequent to the flotation of the Company; account books and cheques showing the distribution of the £150,000 subscribed by the public; the original orders for tubing mentioned in the prospectus; books of the plaintiff Company, showing the expenditure (after flotation) for buildings and alteration and extension of machinery and plant, &c.

For the purposes of this report the following summary is given, from the evidence and documents in evidence, of the history of the plaintiff Company, with a view to explaining the findings of the jury and the judgments of the Court.

The Cycle Components Manufacturing Company, Limited, of Birmingham, were carrying on, in the summer of 1896, some twelve different branches of business in connexion with the cycle industry, the good-will of the entire being put down in their balance-sheet (of October, 1896) as worth over £44,000. The capital of the Company was at this time £150,000, with £20,000 debentures, and £8000 due on a mortgage of a temporary character. From their accounts for the year ending 31st August, 1896, it appeared that their operations for the year 1895 had been unsatisfactory; that there was an adverse balance at the bank, and that the directors' fees for that year had been unpaid. At this time Mr. Harvey Du Cros, senior, was chairman of the Company; Charles Sangster (a witness) a director; Harvey Du Cros, junior (a witness), director and manager; and his brother, Mr. Arthur Du Cros, a director. It appeared further that, prior to the 3rd July, 1896, the Components Company had entered into contracts, for the sale of three branches of their business, for a total sum of £153,000—including £50,000 for the sale of the "tube department" (which undertaking ultimately became the property of the plaintiff Company) to Mr. E. T. Hooley. None of these contracts were produced at the trial.

Q. B. Div. 1898.

COMPONENTS TUBE CO. v. NAYLOR.

On the 3rd July, 1896, an extraordinary meeting of the company was held for the purpose of obtaining the shareholders' sanction to these sales, at which the chairman, Mr. Harvey Du Cros, senior, made a speech. The witnesses, Sangster and Harvey Du Cros, junior, were present at the meeting, apparently assenting to the statements made from the chair. They were cross-examined by counsel for the defendant as to what Mr. Du Cros, senior, had said on that occasion (73, 74, 86). Objection was taken by plaintiffs' counsel, but the questions were allowed. On a subsequent day (95) the witness, Sangster, re-called by plaintiffs' counsel, produced a newspaper report of the speech from the *Birmingham Daily Post*. His Lordship declined to allow the document to be put in evidence, but allowed witness to refresh his memory by looking at the report, as witness had stated that he saw it the following day and that it was a substantially accurate account of the proceedings. The report was then read at the trial. Mr. Du Cros, senior, was there reported to have referred to the Report of the Company for the preceding year, in which it had been stated that "the tube trade, which was a fruitful source of loss, has recovered its tone, and remunerative prices are now being obtained"; and he was further reported to have said that, "by a curious set of circumstances they had converted the very items which had been a loss (the rim trade and the tube trade) into items of profit. . . . . In justice to their own people it should be said that the tube trade which last year resulted in a loss, had been converted into a very profitable business." Mr. Du Cros, senior, apparently had also stated that he had £10,000 in his pocket as a deposit paid on the contract for the sale of the tube business to E. T. Hooley.

His Lordship told the jury (97) that, "strictly speaking, this speech . . . is not evidence; the only way it becomes evidence is by reason of the defendants' counsel having asked Mr. Harvey Du Cros, junior, whether his father had not stated that the tube business was a fruitful source of loss; that Mr. Du Cros, junior, had said that he believed his father did make that remark, but said that, as a practical mechanic, he did not agree with him, so that apparently the impression on the mind of Mr. Du Cros, junior, was that his father had made a fallacious statement, whereas this

document appeared to show that the father represented the tube business as in a most healthy condition." In his charge the learned Judge again pointed out to the jury that the speech was no evidence in itself, but that, if it was to become evidence, it was, to his mind, in the plaintiffs' favour, and that, if evidence, it could become so only because Sangster and Harvey Du Cros, junior, were present at the meeting apparently assenting to the statement made from the chair.

The minute-book of the Manufacturing Company of the 3rd July (produced by plaintiffs) contained an entry that an offer had been made by Hooley for the purchase of the good-will, plant, and contracts relating to the tube business, and a deposit made of £1000; and a further entry of a resolution of same date that the time allowed to the purchasers in which to complete their contract should be extended until the 14th August, "in consideration of paying a further deposit of £9000."

The same minute-book, under date of the 2nd October, 1896, contained an entry that a formal agreement for the sale of the tube department to E. T. Hooley for £40,000, payable by drafts at four months date, was laid before the Board, and it was resolved that the same be passed and the seal of the Company be affixed thereto, the purchaser to be entitled to all profits, and liable to all expenses, as from the 1st September last; and the £10,000 deposit paid under the previous arrangement was declared forfeited to the Company. This was the contract of 1st October, 1896, mentioned in the prospectus of the plaintiff Company. The original contract of purchase for £50,000 was not produced at the trial, nor the cheques for £1000 and £9000 (or £10,000). It did not appear definitely when the £9000 was paid, or when the £10,000 became forfeited, except under this minute. An explanation why the second sale was for a lesser amount than the earlier one, was given by Harvey Du Cros, junior, who stated that the deed of 1st October was executed to give Hooley a further option to purchase, the principal condition being that Hooley should hand to the Company the balance of the cash which he had forfeited, £9000 (108). As to this, however, the witness subsequently corrected his recollection, stating that Hooley had paid £1000 and £9000 before the 1st July, and had agreed to pay a further

Q. B. Div. 1898.

COMPONENTS TUBE CO. v. NAYLOR.

deposit of £5000, which was not extracted, bills for £40,000 being taken instead (109, 110); that the Company had received the £10,000 forfeited; and that witness remembered this because it came at a very opportune time; he could not remember the month, but remembered that he was managing the business, and appreciated the £10,000, the Company being at the time overdrawn at the bank (76).

By the contract of the 1st October, 1896 (produced), Hooley was, for £40,000, payable on the 15th December, 1896, to get the good-will of the tube business and the plant and the buying contracts (value undisclosed); he was also to get a lease of the premises for five years, at £350 a-year and taxes, renewable at Hooley's option for a further period of five years; the stock-in-trade was to be taken at a valuation in addition to the £40,000; and the vendors reserved to themselves the right to manufacture tubing for their own purposes. The contract was to be completed on the 15th December; if not completed it might be determined at a month's notice. Apparently no valuation was made, nor was any account of the profits taken in the transaction with Hooley. Bills were given by Hooley for the £40,000, but these were not produced at the trial.

About the 30th November, 1896, Hooley asked Mr. F. F. Mac Cabe of Dublin, verbally it would seem, to take the "Cycle Components Tube Company" over from him and float it; and Mac Cabe wrote to Harvey Du Cros, junior, stating this, and adding "I have spoken to your governor about the idea, and he approved of it, and said to speak to you about it." In this letter Mac Cabe asked for a copy of the contract with Hooley, and said he would be glad to have Harvey Du Cros junior's opinion on the whole thing.

Shortly afterwards, Mr. Mac Cabe entered into an arrangement, apparently verbal, with Mr. Daniel D. Bulger (a Dublin stockbroker), by which they agreed to go halves, and share the risks and profits of the promotion between them; and Bulger, to reduce the liability, then asked F. Cuthbert and R. Wootton, both stockbrokers, of Birmingham, to join them. Apparently, Mac Cabe only learned of this when the matter was arranged, but he agreed as soon as asked. This agreement between the syndicate of four was

stated to have been a verbal agreement to divide the profits into five parts, one of which was to be disposed of as the majority might decide (140). From this time on, Bulger (apparently with Cuthbert and Wootton) carried on all negotiations with Hooley, with whom, it would seem, there was no contract in writing, and Bulger also had interviews with H. Du Cros, junior, in regard to the flotation of the Company. These negotiations and interviews resulted in an arrangement by which the parent company was to grant a new lease to the intended Tube Company for a term of twenty-one years, with an option of purchase.

On or about the 13th January, 1897, apparently for the first time, Bulger consulted Mr. J. B. Purchase (solicitor), of London, who, with some hesitation, as Bulger was then unknown to him, consented to act as solicitor for the promoters. Purchase was solicitor for the Manufacturing Company; the original contract with Hooley, apparently of May, 1896 (undisclosed), and the deed of 1st October, 1896, had been drawn by him. He was also solicitor for the plaintiff company. At this interview Bulger was alone. Bulger brought with him to the interview some "rough notes" or memoranda (produced) of the proposed prospectus, of a proposed agreement by which H. Du Cros, junior, was to get £10,000, and of the proposed agreement with Hooley under which Hooley was to receive £50,000 for his interest in the contract of 1st October.

At this interview, Bulger stated to Purchase that he and Mac Cabe, Cuthbert and Wootton, were to be the promoters of the Company. Purchase told Bulger that there should be a contract between this syndicate, and a draft memorandum was prepared with the object of having a printed agreement between the syndicate drawn up, but this was never executed (140).

At this interview the agreement with Harvey Du Cros, junior (subsequently embodied in the contract mentioned in the prospectus, between W. H. Weekes and Harvey Du Cros, junior), was drafted in the form of a letter ("Z," produced) to be signed by Harvey Du Cros, junior. This draft ran:—

"In consideration of your agreeing to pay me in cash or shares in the same proportion as you receive your profits out of the promotion of the proposed tube company, as and when you receive same, £10,000, I hereby agree to

Q. B. Div. 1898.

COMPONENTS TUBE CO. v. NAYLOR.

obtain for your proposed Company orders for cycle tubing from the following Companies ..... within four days from this date" (149, 150).

Purchase in his evidence stated (49) that the £10,000 was to be paid for getting orders to be put into the prospectus; that afterwards this was put "into legal form"; that H. Du Cros, junior, got this sum "to do the best he could for the Company" (49); that Bulger asked him the best form to put it in; that the amount was large, but it was an "arduous task" (49). Bulger's "rough note," made by him with a view to his first interview with Purchase, was (148), "Harvey Du Cros to procure orders from Companies for tubing; form of letter to be drawn up"; but Bulger stated (149) that, though he expected H. Du Cros, junior, to get orders, the latter was under no obligation to provide orders for the prospectus, and that, to his knowledge, there was no understanding that he was to get these orders (149). Harvey Du Cros, junior, who did in fact personally obtain three of the orders for tubing in the prospectus, stated in his evidence that he never saw this draft letter ("Z"); that he never agreed to get orders (119, 115); that he did not spend an hour in getting the orders; that the arrangement as to his getting the £10,000 was first proposed by himself (115) to Mr. Mac Cabe, at the National Show (7th to 13th December, 1896), when Mac Cabe discussed the matter and asked him "whether he would take an interest in" the proposed Company. Du Cros stated that his exact language (to Mac Cabe), was:—"If you do what I have told you, I will take an interest in the Company and go on the Board." (I told him) "I will go on the Board if the several suggestions which I made were carried out. The first was that the new Company be handed £20,000 to extend the existing plant; the second was that we should be handed £20,000 in cash for working capital; and the third was that the capital should not exceed £150,000. The fourth was that Mr. Charles Sangster be asked to take a seat on the Board .... The last condition was that I should take an active interest in the Company, direct the expenditure of the additional money for extension of plant, and that the control of the Company should be carried on by a Board of Directors, of which I should be a member, and all the other members should be approved of by myself (115). I approved of all the directors. And in conside-

ration of this, I was to receive £10,000 in cash, and at all times I was to place the benefit of my experience at the disposal of the Company."

The agreement, as executed, and as referred to in the prospectus, bore date the 27th January, 1897, and was between W. H. Weekes, of 147, Sulgrave-road, Hammersmith (therein called the owner) and H. Du Cros, junior (therein called the Director); and the consideration of the £10,000 was therein expressed to be, that H. Du Cros, junior, was to "give every assistance in his power to, and at all times place the benefit of his business experience at the disposal of the directors of the intended Company, and to act as a director without receiving any payment therefor beyond the ordinary directors' fees." The agreement was conditional upon the completion of the intended sale to the Company.

At the same interview a rough draft prospectus was prepared from Bulger's rough notes (140). There were not inconsiderable changes and differences between the draft, as put into shape (with many blanks), at or after this interview (called "Proof B"), and the prospectus as finally published; but these, for the purposes of this report, are sufficiently noticed *infra*, p. 65.

At the same interview of the 13th of January, a letter was drawn up, embodying the agreement with Hooley (130); and providing for the mode in which the £50,000 was to be paid to him; and this, it would appear, was subsequently signed by Hooley (130), but the document was not produced at the trial.

Of the prospectus, there were several skeletons or proofs, as well as the rough draft, "B" (31, 32); but only Bulger's "rough notes" and one printed proof ("B") were produced. Purchase stated that it was in print when he first saw it; but this apparently was an error, if Bulger's "rough notes" were read or shown to him. "Acting under the advice of eminent counsel," Purchase suggested the use of a nominee, Weekes, as an intermediary between the vending syndicate and the purchasing Company (29); [this evidence was objected to by the plaintiffs, and the objection allowed at the trial]. Purchase admitted that Weekes was a nominee, "a dummy." Weekes had been his clerk for three months at £3 a week (29); if doing it again, Purchase would

Q. B. Div. 1898.

COMPONENTS TUBE CO. v. NAYLOR.

put his own name on it (43). His object was to protect all parties. Purchase also suggested Piercy as trustee, a trustee being "a purely formal matter" (35); Piercy was Purchase's managing clerk. It was probably Purchase who put in the reference in the prospectus to the "Hudson Company" (36). Purchase did not produce his attendance book, or costs book, or copy-letter book. He had several interviews between this date and the 30th of January with Bulger, at some of which possibly Mac Cabe and H. Du Cros, junior, were present.

The contracts in the prospectus were prepared by Purchase, being "drafted" by counsel upon his instructions; they were prepared by counsel in the form of "A, B," contracts, with blanks for the names. His Lordship, at the trial, refused to admit evidence of the advice or opinions given by counsel. The final proof of the prospectus was settled by Purchase, who, on direct examination by plaintiffs' counsel, stated that the prospectus was submitted to and approved of by him on behalf of the company, and that he went through it many times and vouched every statement in it (27). The contracts Nos. 2, 3, 4 and 5, disclosed in the prospectus, were not signed on the 27th January, 1897; they were got back in draft from counsel not earlier than the 28th, and were executed between the 28th and 30th of January.

By the contract, 27th January, 1897 (Hooley to Weekes), Hooley, in consideration of £50,000, assigned his interest in the contract of the 1st October to William Henry Weekes.

By the contract 28th January, 1897, Weekes to Piercy, Weekes assigned his purchase to Piercy, as trustee for the intended Company, in consideration of the sum of £130,000. This document contained an undertaking by Weekes to provide £20,000 for alterations, &c.; an undertaking to accept payment in cash or shares at the option of the directors, and a stipulation that he might subscribe for and require the directors to allot to him or his nominees at least a third of the capital. Weekes' address was given in the various deeds, but no description.

The contract, 27th January, 1897 (Cycle Components Manufacturing Company to Piercy), contained an agreement for a lease of the tube premises, at a rent of £400 a year, for 21 years; and, as settled by counsel and engrossed, contained originally an option

of purchase at £6000 any time during the 21 years' term. It was altered, however, by H. Du Cros, junior, when executing the engrossment as director of the Manufacturing Co., so as to make it necessary to exercise that option during the first five years; and the option of renewal was made to be at the option of the lessors. A formal lease in these terms was subsequently executed on the 16th October, 1897.

As to the trade contracts mentioned in the prospectus, the thirteen orders for tubing there listed, with the exception of the Swift Company's order, were obtained between the 13th and 25th January, 1897. The Swift Company's order was obtained in September, 1896, but was an order under which the Swift Company might decline to take delivery. Of the others, several were (it was found) the result of "underwriting contracts," entered into with representatives of the Companies giving the orders, at a commission (or discount), varying from 12½ to 25 per cent. Three of them were obtained by Harvey Du Cros, junior; three by B. B. Tuke (a director). The Riley Company's order (by way of example) contained a condition that the prices were not to be higher than those charged at the time of delivery by other manufacturers; and one of the directors of that Company had underwritten shares at 25 per cent. to the extent of 1000 shares, and was subsequently paid the commission, £250. Mr. Justice Gibson asked the jury to consider whether these trade orders were real, or fraudulent, not fraudulent in the sense that the orders were not to be executed, "but in the sense that they would not have been obtained at all in ordinary legitimate trade," and to consider whether they were "the result of bribes? bought orders, got for the purpose of putting in the window as samples, as good fruit is put on the top of a barrel of rotten apples?"

As to the contracts for the extension of machinery and plant, there was no documentary evidence of these being entered into prior to the 30th January, 1897, and there was no guarantee in writing or otherwise by anyone save Weekes that £20,000 should be expended on alterations, etc.; but the evidence went to show that, though perhaps not before the dawn of litigation, this sum or thereabouts had been expended, or liability to this extent undertaken, by the company, mainly for new buildings, and partly for

Q. B. Div. 1898.

COMPONENTS TUBE CO. v. NAYLOR.

new machinery and plant. In June, 1897, the old machinery and plant of the tube business (which till July of that year was worked by the Manufacturing Company) was auctioned, and realised some £1200. It was stated however that, as it stood, the machinery was worth far more than that sum.

The undertaking of the Manufacturing Company to take "the whole of the balance of the output for the current season, &c." was not in writing, but was stated to have been carried out in fact. As to this, his Lordship directed the jury that, if this statement in the prospectus meant a legal and enforceable contract, the statement was false in fact.

The undertaking of the same Company to purchase (as stated in the prospectus) at remunerative prices to the Tube Company its full requirements for the subsequent two years, was dated 25th January, 1897, and was subject to a provision that a first call was to be given to the Manufacturing Company, and that the price was to be at the maximum discount. It appeared on the evidence that an extra discount was subsequently allowed by the Tube Company in August, 1897. As to this contract, his lordship asked the jury, in his charge, whether it ought to have been stated or not that this contract was subject to these onerous provisions.

Evidence was admitted to show that underwriting contracts had been entered into prior to the flotation of the Company, covering in all over 73,000 shares; and that, out of the profits of promotion, a sum of £13,471 was paid to the underwriters in respect of their commissions. Purchase stated that he knew nothing of the underwriting (34). Piercy, the trustee, though Purchase was not aware of it (34, 35), underwrote for 200 shares; Sangster (a director), asked leave to underwrite, and underwrote 1000 shares at 15 per cent. (88), and thought that he was incurring risk; he asked Bulger, verbally, to underwrite these for him (88); H. Du Cros, junior, admitted that, in order to get trade orders, it was allowed to underwrite (113), and that pressure was brought to bear in order to be allowed to underwrite (113); he himself underwrote 2000 shares at 15 per cent. Mac Cabe stated (130) that the necessity for this expense was explained by the fact that the syndicate had to undertake and

guarantee the capital; and that a verbal guarantee was given to H. Du Cros, junior, before he agreed to come on the board (130). Hooley underwrote 20,000 shares at 25 per cent. These underwriting contracts were apparently arranged by Bulger, Harvey Du Cros, junior, Cuthbert and Wootton; but the contracts were not produced, nor were their dates proved.

The final printed prospectus was issued to the public on Saturday, the 30th January, 1897; it also appeared in several Irish newspapers on the morning of that date.

The flotation was most successful; the capital being far more than fully subscribed for; and the shares were "quoted" on the Dublin and Birmingham Exchanges at a considerable premium for some days prior to the 4th February. On that date they were dealt in at 20*s.* 6*d.*, but decreased in market value steadily thenceforward.

The allotment of shares to applicants took place on Thursday, the 4th February, at the Midland Grand Hotel, London. The allotment lists and application forms (produced) proved the defendant to have been a subscriber for 100 shares (paying 2*s.* 6*d.* a share). Annexed to the ordinary lists was a "List of Special Applications for which deposits have not been lodged," which included the names of many of the promoters and persons connected with the promoters. Certain of these had sold out, at a profit, prior to the allotment of the shares to them on the 4th February. Present at this allotment meeting were—Tuke, Sangster, De Beck, and Mecredy, directors, and also H. Du Cros, junior, and Mr. Mac Cabe; but the latter two, it was stated, took no part in the business of the meeting (59). At Purchase's request the several directors, save H. Du Cros, junior, put their signatures to a copy of the prospectus at this meeting; and the same copy was signed subsequently by that gentleman.

Putting aside the £20,000 reserved for working capital, and the £20,000 guaranteed for extensions, etc., the profits on the sale were £110,000. This sum was duly and particularly accounted for, the company disbursing this amount in cheques, drawn in favour of Weekes and handed directly to Bulger, or drawn in favour of Weekes *per* Bulger, or drawn in favour of the company's solicitor, Purchase. Roughly speaking, Bulger

Q. B. Div. 1898.

COMPONENTS TUBE CO. v. NAYLOR.

received and accounted for £50,000, and Purchase for £60,000. The latter sum was applied in payment of £10,000 to H. Du Cros, junior, under his agreement, and to Hooley, £50,000,—£40,000 of which was paid by Purchase directly to the Manufacturing Company to meet Hooley's outstanding bills for that amount, while the balance (£10,000) was paid, upon the written request of Hooley, to Mr. Harvey Du Cros, senior, in discharge of an indebtedness in respect of another transaction (Purchase's evidence (48)).

The £50,000 received by Bulger was also duly and precisely accounted for in his ledgers (produced); and was applied in discharge of—advertising (£3508), underwriting commissions (£13,471), solicitor's fee (£1500, and £375 out of pocket expenses, to Purchase), brokers' fees, and travelling and other preliminary expenses in connexion with the promotion; and the net balance, some £25,000, was divided, after deducting a special fee to Bulger of £4000 (141), into five parts: the four members of the syndicate and Hooley each receiving £4200. The £3508 for advertisements was paid to Mac Cabe for the printing and issuing of the prospectus and for notices, &c., in his own and some hundred other newspapers.

The directors' share qualification in the company was 500 shares.

De Beck (a director) applied, apparently verbally, for 100 shares. He was presented with 500 in August, 1897, by Bulger.

Sangster (a director), in addition to the £150 for underwriting, received in September, 1898, 1000 shares in the company from H. Du Cros, junior. He stated that H. Du Cros, junior, offered him £1000 which he refused, preferring to take that number of shares, though the shares were only value for 8*s.* or 9*s.* at the time. "Mr. H. Du Cros, junior, was doing a little work for the company, and after a little while longer he found it was more than he could do; I got through a portion of the business, and in September he said he would like to recompense me in some way. He offered me a cash consideration, but I said I would take some shares in the company." Sangster, apparently verbally, applied for 500 shares, and paid the application money thereon (£62 10*s.*) The balance was paid for him by Bulger subsequently.

Tuke (also a director) got 500 shares from Bulger on the 22nd February, 1892 (entered as £500 in the Profit and Loss account), of which amount each of the four members of the syndicate was debited with a quarter. Bulger was unable satisfactorily to explain the entry which appeared in his ledger: "B. B. Tuke: by commission on orders received, £500."

The minute books of the plaintiff company, so far as disclosed in evidence, dealt merely with the application of the subscribed capital, in discharge of the purchase moneys, or in connexion with new buildings and extensions, or in investments of surplus capital; the trade business being left altogether in the hands of the parent (Manufacturing) Company until the 30th June, 1897, when an account was taken, showing an indebtedness to the parent company for management, expenses, &c., of £4226, for the period from September, 1896, to June, 1897. Against this, it was stated, should be set off the stock in trade and materials on hands at the latter date.

The defendant neglected to forward his calls for shares, and, being threatened with legal proceedings, wrote on the 17th June, 1897, to the secretary of the plaintiff company, asking for time. Subsequently, in August, 1897, he repudiated, and declined to pay anything, on the ground that the prospectus, on the faith of which he had subscribed, was fraudulent and misleading. Examined at the trial, he stated that he would not have applied for shares had he known that Mac Cabe and Bulger were vendors (156).

The writ was issued in August, 1897.

The following were the questions submitted to the jury, with their answers thereto:—

1. Did the prospectus convey—

(*a*) That the business was profitable and extending? (Answer—Yes.)

(*b*) That the sale to Hooley was *bona fide* and real? (Answer—Yes.)

(*c*) That the sale under the contract of October, 1896, had been completed? (Answer—Yes.)

(*d*) That since the sale, contracts for the alteration and extension of machinery, &c., were being entered into

Q. B. Div. 1898.

COMPONENTS TUBE CO. v. NAYLOR.

by or on behalf of the Vendor at the cost of £20,000? (Answer—Yes.)

(*e*) That the orders obtained in January, and enumerated in the prospectus, were *bona fide* trade orders? (Answer—Yes.)

(*f*) That such orders were fair samples of the business done? (Answer—Yes.)

(*g*) That they had been given to the Vendor or his agent? (Answer—Yes.)

(*h*) That the Components Company were bound by a valid and enforceable contract to take the whole balance of the output for the coming season? (Answer—Yes.)

(*i*) That the right of renewal was for 21 years? (Answer—Yes.)

(*j*) That the Vendor was *bona fide* owner, by purchase, of the business, etc., to be acquired by the new Company? (Answer—Yes.)

(*k*) That such Vendor had in fact stipulated for the right to be allotted one-third of the capital? (Answer—Yes.)

(*l*) That such stipulation was real and *bona fide*? (Answer—Yes.)

(*m*) That the Vendor, in fact, recognising the importance of Mr. H. Du Cros' services, secured them at his own expense for £10,000? (Answer—Yes, except as regards amount.)

(*n*) That the Vendor, in fact, guaranteed £20,000? (Answer—Yes.)

2. Were these statements, or any, and which of them false? (Answer—All false.)

3. Were the following contracts or orders described so as to mislead—

(*a*) The Swift Company order? (Answer—Yes.)

(*b*) The Riley Company order? (Answer—Yes.)

(*c*) The orders connected with promises of underwriting? (Answer—Yes.)

(*d*) The contract of the 25th January, 1897, from the Components Company, as to purchase by them for two years at remunerative prices? (Answer—Yes.)

4. Were the following omissions misleading—

(*a*) The omission of the name and description of Weekes? (Answer—Yes.)

(*b*) That of the names of the promoters as the real principals? (Answer—Yes.)

(*c*) That of the principals to whom the orders were given? (No answer.)

(*d*) The omission to state that money was to be spent in underwriting? (Answer—Yes, under the circumstances.)

(*e*) That two directors had underwriting contracts? (Answer—Yes.)

(*f*) The omission of the amount of the several purchase moneys? (Answer—Yes, in the absence of any assets or profits being disclosed.)

(*g*) That of the term in the contract with Piercy, that the length of the renewal term was to be fixed at the discretion of the lessors? (Answer—Yes.)

(*h*) That of the limitation of the option of purchase to first five years? (Answer—Yes.)

5. Was the prospectus as a whole substantially misleading and calculated to deceive? (Answer—Yes.)

6, A. If any of the statements in question No. 1 were false, or any of the descriptions or omissions mentioned in questions 3 and 4, and the prospectus as a whole, were misleading, were they material, or some, and which of them? (Answer—Yes, all except (*g*) in No. 1, and (*c*) in No. 4.)

B. Was defendant thereby induced to apply for and take the allotment of shares? (Answer—Yes.)

7. Was the prospectus fraudulent in said particulars? (Answer—Yes.)

8. Did the defendant repudiate within a reasonable time after discovery? (Answer—Yes.)

Q. B. Div. 1898.

COMPONENTS TUBE CO. v. NAYLOR.

9. Was it contemplated that a large proportion of applicants would rely on the prospectus without reading the contracts? (Answer—Yes.)

10. Was the underwriting intended given and accepted as a means of gain to the underwriters? (Answer—Yes.)

The learned Judge in his report stated :—

". . . When defendant's evidence closed, Bushe, Q.C., asked for a direction on the ground that there was no evidence of fraud or misrepresentation. I declined to direct. I read out to counsel the questions I proposed to put to the jury and had copies for the use of counsel. No objection was then taken to any of these questions. No objection was raised in reference to the pleadings, which I would have allowed to be amended, and they are to be taken as amended, if upon the answers of the jury and evidence, or any of them, the defendant would be entitled to a verdict on any amended pleading. The case was opened as one in which the entire prospectus was impugned, and evidence in chief was given on that basis. The notice of motion raises no question as to this, as I understand. After I read out the questions, O'Shaughnessy, Q.C., summed up, on May 2nd, for defendant. He referred to *Jury* v. *Stoker* (9 L. R. Ir. 398) as to the necessity of candour in a prospectus, and charged the whole transaction as being a conspiracy to defraud. Bushe, Q.C., replied on the 2nd and 3rd May. He contended that Hooley had sent the £9000 by Arthur Du Cros, and that it was paid on July 3rd. He strongly relied on Du Cros senior's speech that day as proving that the tube business was then prosperous and extending—a view of the speech which I thought fair—though perhaps subject to some discount from the fact of the sale to Hooley then agreed on. With reference to the execution of the tube orders referred to in prospectus, he stated which of them were completed as shown by the books, and I advised the jury to accept the statement as correct. On the question of profits, he also laid stress on the report [of the Manufacturing Company], 16th October, 1896, and account of July 1st, 1897, though not a profit and loss account, as evidencing a good trade.

" In my charge I directed the jury that no fraud antecedent to the formation of the Company could affect the case, and to confine their attention exclusively to the prospectus. If there was substantial misrepresentation in anything stated or omitted, the defendant, if thereby induced to contract, was entitled to rescind within a reasonable time: *Karberg's Case* ([1892] 3 Ch. 1). I gave a short summary of the facts and then directed the jury's consideration to the several paragraphs of the prospectus, and the evidence bearing on them, explaining to the jury that the *onus* of proof lay on the defendant throughout. As it occurred to me that some of the paragraphs might be ambiguous, to preclude controversy, I put questions representing what seemed the most obvious meanings, telling the jury that as to some which

I specified the meaning was certain. I explained the scope of the several questions. The jury seemed intelligent. . . . I referred shortly in my charge to *Smith* v. *Chadwick* (9 App. Cas., pp. 196, 201) and *Aaron's Reefs Company* v. *Twiss* ([1896] A. C. 273).

"At the conclusion of my charge, Bushe, Q.C., renewed his application for a direction, and that no questions should be left. He objected to the two last questions not, as I took it, in form, but as a matter of substance, and also to the first question, as leaving to the jury matters of legal construction. He did not dispute that the prospectus might bear the suggested meanings. He also asked me to rule, as matter of law, that it was unnecessary to refer in the prospectus to underwriting. Save to the above extent, no objection of any sort, either in fact or law, in form or substance, was made to the questions or to my charge, nor was I asked to supplement, qualify, explain, or correct my charge in any way. The misdirection in the notice of motion seems limited to my refusal to direct in favour of plaintiffs.

"Many difficult questions of evidence were raised by counsel on both sides. I considered that the opinion of the Lord Chancellor in *Aaron's Reefs* v. *Kiernan* [unreported], following that of Mr. Justice Holmes at Nisi Prius, was not overruled by the decision of the House of Lords in *Twiss' Case* ([1896] A. C. 273), and I therefore confined the defendant to the prospectus, its statements and omissions, excluding all evidence not appearing to be relevant to establish falsehood or misleading in that document, or to displace plaintiffs' evidence. I was, however, of opinion that evidence was admissible to dispute all the allegations of fact in the prospectus, and that such evidence necessarily might relate to the period before the Company was formed. The speech of Du Cros, senior, made, apparently, in presence of reporters, appeared to me rather to assist the plaintiffs. The fact that there had been a loss in 1895 was proved by the Report of October, 1896, an important document, which was received without objection, and which was relied upon by plaintiffs. It occurred to me that the speech was not evidence in itself, but that, having been made in the presence of Sangster and Du Cros, junior, both directors at the time, and examined as witnesses to prove the truth of the prospectus, their conduct in reference to it might be relied upon as displacing their evidence, if its effect was opposed to their statements.

"I thought that the transactions and interviews between promoters, Hooley, and others, were only relevant so far as they threw light on the statements of fact contained in the prospectus, their accuracy or inaccuracy. As to underwriting, I thought that evidence on this point was relevant, not only as to directors and the obtaining of orders, but also might be important on the view suggested by The Mac Dermot, Q. C., founded on the decision of Mr. Justice Kekewich, if good law. The motion raises no question as to exclusion of evidence. I excluded evidence on behalf of defendant as to payments made by promoters after the formation of the Company not shown to be connected with any previous contract, and also disallowed evidence as to statements and

Q. B. Div. 1898.

COMPONENTS TUBE CO. v. NAYLOR.

advice of Bulger and M'Cabe in connexion with applications for shares, offered [by the defendant] to show that the non-disclosure of the true vendor's name was likely to mislead. Though the use of a nominee on behalf of promoters is not necessarily misleading, I considered that upon the facts of this case the question could not be withdrawn from the jury. There was no reference to any principal; the vendor was described as entering into important personal engagements; the relations between the promoters and Harvey Du Cros, who was getting £10,000, might be material in the eyes of a subscriber, and one of the real vendors was Bulger, the Company's broker. . . . On the findings of the jury I directed a verdict, and gave judgment for defendant in the action and counterclaim."

Counsel for the plaintiff company now moved for an order that the findings, verdict, and judgment in the action be set aside, and that a verdict for the full amount claimed be entered for the plaintiffs with costs, on the ground of misdirection and non-direction by the learned Judge, in not directing the jury to find for the plaintiffs, and in not directing them that there was no legal evidence of any such fraud, concealment, or misrepresentation on the part of the company as by the defendant was alleged and relied on; and on the ground that the questions submitted to the jury by the learned Judge were not, nor were any of them, questions proper to be submitted to the jury; and that notwithstanding the findings of the jury on the several questions left to them, the Judge should have directed a verdict for the plaintiffs; and also on the ground of the reception by the said learned Judge of evidence not relevant to the issue or admissible in law against the parties thereto.

Ronan, Q.C., Bushe, Q.C., Matheson, Q.C., Denis Henry, Q.C., and *J. Pim*, for the plaintiffs.

The Right Hon. The Mac Dermot, Q.C., O'Shaughnessy, Q.C., Cherry, Q.C., and *Shortt*, for the defendant.

June 28.

THE COURT, at the conclusion of the arguments, unanimously ordered that the plaintiffs' application be refused with costs, but postponed the delivery of their judgments upon the motion to a subsequent date.

SIR P. O'BRIEN, L. C. J.:—

At the close of the arguments in this case we announced the result at which we arrived, namely that the plaintiffs' motion to set aside the verdict which had been found against them should be refused with costs. Owing, however, to the magnitude and importance of the case, we thought it well not to assign verbally the reasons upon which our judgment was based. We have since the conclusion of the arguments reduced these reasons to writing, and we now proceed to make them known.

It will be remembered that the action was one brought by the plaintiff company against the defendant, Mr. Naylor, to enforce the payment of a certain call upon shares which had been allotted to him in the plaintiff company. Mr. Naylor's defence was substantially this, that the prospectus of the company was a dishonest document; that he was induced by the prospectus, which he so characterised, to purchase the shares in respect of which the call for which he was sued, was made; and that he repudiated, within a reasonable time, his contract of purchase. This was in substance his defence. The jury who tried the case affirmed by their verdict its substantial truth; and the main question for our determination was, whether there was evidence, legal evidence, to warrant the verdict of the jury. There were other questions, which to my mind were of a very subordinate character, as to the admission and rejection of evidence: but the main question presented for our consideration was whether the prospectus of the company, which was operative to induce the defendant to take shares, was an honest or dishonest document. We are unanimously and clearly of opinion, that there was ample evidence to sustain, what was in substance the finding of the jury, that the prospectus was a dishonest document—in other words, that it was an instrument of fraud by which the defendant was induced to take shares.

Before I examine the facts, I should like to advert to the law. To my mind, there is no difficulty whatever in point of law. The proposition that a contract induced by fraud can be repudiated by the person who is defrauded, provided he retains no benefit under the contract and repudiates it within a reasonable time, is as well

Q. B. Div. 1898.

COMPONENTS TUBE CO. v. NAYLOR.

Sir P. O'Brien, L.C.J.

settled as any legal proposition can be. This proposition applies to a person who contracts to take shares as the defendant did in this case. Learned disquisitions as to the degree of the exaggeration and high colouring that may be allowed in prospectuses, as to the precise measure of the obligation of disclosure—what should be disclosed and what may be not disclosed—all these topics are treated with great subtlety and vast amplitude in our law books; but, when all has been said, the net and concise legal proposition that I have indicated remains. It is for the jury under all the circumstances of the case, having regard to what has been stated, or what has not been stated, what has been disclosed, or what has not been disclosed, what has been done or left undone, to say whether fraud has been established—fraud, resting on the wilful misrepresentation or suppression of material facts, or reckless disregard as to whether the statements in the prospectus are true or false. This was principally the basis on which this case was argued. No doubt a contract to take shares may be rescinded if it has been induced by a material allegation which was not true, even if there was no fraud in the matter, as was laid down by Lord Justice Lindley and Lord Justice Kay in *Karberg's Case* (1) when referring to *Redgrave* v. *Hurd* (2).

This would be a low, but a substantial ground for upholding the verdict; but the high ground of moral fraud was taken in the argument, and was, in my opinion, fully sustained. It appears to me to be one of the most elementary obligations of law as well as of morality that a prospectus, upon which the public are invited to buy, should be an honest and a candid one. When an invitation is held out to the public to buy on the faith of a prospectus, candour, entire candour, becomes an essential element of honesty.

So long ago as 1860, Vice-Chancellor Kindersley, in a luminous judgment delivered in the case of *The New Brunswick and Canada Railway Company* v. *Muggeridge* (3) expressed himself thus:—

"It appears to me" (said the Vice-Chancellor) "that it is quite necessary to uphold this as a principle: that those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the

(1) [1892] 3 Ch. 1. (2) 20 Ch. D. 12. (3) 1 Dr. & Sm. 363.

faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge, the existence of which might in any degree affect the nature or extent or quality of the privileges and advantages which the prospectus holds out as inducements to take shares."

This statement of the law by Vice-Chancellor Kindersley received the emphatic approval of Lord Hatherley in the case of *Henderson* v. *Lacon* (1). Equally plain is the language of Lord Chelmsford, in the case of the *Central Railway Company of Venezuela* v. *Kisch* (2). One pithy sentence in his judgment in that case puts the law on a very clear and intelligible basis—

"In my opinion" (said Lord Chelmsford) "the public who are invited by a prospectus to join in any new adventure ought to have the same opportunity of knowing everything which has a material bearing on its true character as the promoters themselves possess."

In the recent case of *Aaron's Reefs Company* v. *Twiss* (3) these statements of the law by Vice-Chancellor Kindersley, and Lord Chelmsford, formed the basis of the judgments of Lords Justices Fitz Gibbon and Barry, which, on appeal, were upheld and approved of by the House of Lords (4).

There is one passage in the judgment delivered by Lord Halsbury in the case of *Aaron's Reefs Company* v. *Twiss* (3), which, in my opinion, cannot be too frequently adverted to. In dealing with the character of the prospectus in that case, he is reported to have expressed himself as follows:—

"It is said" (he is reported to have stated) "that there is no specific allegation of fact which is proved to be false. Again I protest, as I have said, against that being the true test. I should say, taking the whole thing together, was there false representation? I do not care by what means it is conveyed, by what trick, or device, or ambiguous language; all these are expedients by which fraudulent people seem to think they can escape from the real substance of the transaction. If by a number of statements you intentionally give a false impression and induce a person to act upon it, it is not the less false although, if one takes each statement by itself, there may be a difficulty in showing that any specific statement is untrue."

(1) L. R. 5 Eq. 262.
(2) L. R. 2 H. L. 99.
(3) [1895] 2 I. R. 207.
(4) [1896] A. C. 273.

Q. B. Div. 1898.

COMPONENTS TUBE CO. v. NAYLOR.

Sir P. O'Brien, L.C.J.

This is the language of Lord Halsbury; and in it, in my opinion, is to be found the best protection for the investing public and the most wholesome admonition to designing company-mongers. Lord Halsbury says:—"Taking the whole thing together, was there false representation?" In the case before us, not only is the general impression produced by the prospectus false, but there are many specific statements in it which the jury, upon evidence on which they might reasonably act, have found to be false.

Before I pass from the law bearing upon the subject, I cannot help referring with entire approval to the language of Lord Justice Barry, in his judgment in *Aaron's Reefs Company* v. *Twiss* (1), which seems to me to have been delivered in a spirit of protest against some observations which were made by a very learned Judge in England in the case of *Aaron's Reefs Company* v. *Broadhurst* (2). When commenting upon the prospectus of that Company, the very prospectus which elicited the observations of Lord Halsbury that I have referred to, Mr. Justice Wright said:—

"I do not, and I cannot, consider the prospectus a candid one; but the evidence given by the defendant has, to my mind, failed to establish that the prospectus is *sufficiently misleading* to entitle him to relief."

With reference to these observations Lord Justice Barry said:—

"With all respect for Mr. Justice Wright, I must prefer the rule of sense, morality, and law, laid down by Vice-Chancellor Kindersley and Lord Chelmsford, to any conceivable practical system of gradation in fraud."

The cases to which I have referred clearly ascertain the law. I now turn to the facts. It appears that the business which the plaintiff company was formed to carry on, was a development—if indeed it was a development—of a certain business which had been established in 1882, by Mr. James Hudson, and carried on by him until 1892, when it was converted into a company under the title of Hudson & Company, Limited; and it had been carried on by

(1) [1896] A. C. 273. (2) Unreported.

that company until it was taken over by the Cycle Components Manufacturing Company, Limited, in 1894. So the prospectus tells us. The latter company carried on various kinds of businesses, and what it acquired by the purchase of 1894 was a business which was established for the manufacture of weldless tubing. The prospectus stated that the manufacture of weldless tubing had become such an important feature of businesses other than the cycle industry that it was "desirable" that a separate company should be formed to work and extend this important and long established business which, under the style of Hudson and Company Limited, and later as a branch of the Cycle Components Manufacturing Company, Limited, had maintained a great reputation for tubing of the highest grade. It was to acquire, carry on, and develop this business that the plaintiff company was formed—or rather, I should say, it was with this object that the prospectus, issued to the public by the plaintiff company, stated that the plaintiff company had been formed. The words of the prospectus are—I think it well to give the words:—

"This Company has been formed to acquire, carry on, and develop the well-known profitable and extending tube manufacturing business carried on by the Cycle Components Manufacturing Company, Limited, at Bournbrook, Birmingham."

I now pass for a moment from the statements in the prospectus, bearing in mind however, that it was issued to the public on the 30th January, 1897. The evidence disclosed that, sometime in 1896, in the month of May of that year, I think, the Cycle Components Manufacturing Company (which, for the sake of brevity, I shall call the Cycle Company), sold this branch of their business to Mr. Hooley for £50,000. What did Mr. Hooley do? Sooner than take this so described "profitable and extending" business, he forfeited £10,000. Mr. Hooley forfeited £10,000 sooner than take a business which was afterwards, in the following January, sold to the plaintiff company, or rather is alleged to have been sold to them, for the sum of £130,000. Of course, there is not one word of this transaction of forfeiture in the prospectus. It would be too much to expect that. It would be unreasonable to expect such a statement; but the business is described as a "profitable

Q. B. Div. 1898.

COMPONENTS TUBE CO. v. NAYLOR.

Sir P. O'Brien, L.C.J.

and extending" business. Let us, however, come down to a period later in the year 1896. The first bargain with Mr. Hooley for £50,000 had fallen through, but the directors of the Cycle Company were somehow apparently very anxious to get into relations with Mr. Hooley. At one time no doubt Mr. Hooley had the prestige attendant upon great apparent success, and was credited with the possession of great financial ability. The directors of the Cycle Company, or perhaps I should rather say those who were operating in the promotion of the plaintiff company, were apparently anxious to deal with him again; and they were certainly very anxious to dispose of what was described as a profitable and extending business. There was another transaction, another bargain with Mr. Hooley: the business was again, in October of 1896, sold to him for £40,000. Was this a real business transaction in respect of which it was contemplated that Hooley was to pay hard cash? or was it a mere promoting transaction? Hooley, as it will subsequently appear, did not pay one farthing in respect of this purchase: on the contrary—just at the advent, as will subsequently appear, of the birth of the company, he sold the business again, or perhaps I should say he purported to sell it, for £50,000. If he had paid the £10,000 which he forfeited, this transaction would recoup him; for he bought at £40,000, and sold at £50,000. But how was Mr. Hooley paid, and who was the person to whom he sold the business? The person to whom he sold was one William Henry Weekes. And who was this gentleman? This gentleman was a clerk in the office of Mr. Purchase, the solicitor for the plaintiff company, receiving as a salary some few pounds a week. Of course *he* did not pay £50,000 to Mr. Hooley. And on what date did Mr. Hooley sell to Mr. William Henry Weekes? On the 27th January, 1897. What else have we? On the next day, on the 28th January, we have the sale of the self-same business by Mr. William Henry Weekes to Mr. Piercy, as trustee for the plaintiff company at the astounding figure of £130,000. Within twenty-four hours the value of this business was made to jump from £50,000 to £130,000—or let me say £110,000, as there was a stipulation that £20,000 should be expended in the purchase of plant. There is not a word in the prospectus about this. These two practically

contemporaneous deals, as they have been designated, between Hooley and Weekes, and Weekes and Piercy as trustee for the plaintiff company, have been carefully suppressed.

This suppression leaves, in my opinion, indelibly upon the prospectus of this company the impress of dishonesty and fraud. Suppose for a moment that an intending investor saw that there were two transactions within twenty-four hours, in one of which the value of the business intended to be sold was put down at £50,000, and in the other of which it was put down at £130,000, I think, unless indeed he was carried away by a reckless, by an insane passion for speculation, that he would pause long before he took shares in the undertaking. Suppose, on the discovery of the tremendous fact of this startling difference as to price, that he did not peremptorily refuse to have anything to say to the undertaking, but made inquiry, and discovered that there was no valuation made, or profits shown—that the price of £130,000 was arbitrarily fixed by Harvey Du Cros, junior, Dr. Mac Cabe, and Mr. Bulger, and that he bore in mind that the capital of the company was fixed at £150,000—a flagrant instance, in my opinion, of over-capitalization—would he invest? Most certainly not, if his conduct was regulated by prudence or common sense.

The jury found that the prospectus was a misleading document; and well they might. I turn to it again. It states that—

"The purchase price has been fixed by the Vendor at £130,000, out of which he provides the £20,000 above-mentioned for alteration and extension of the plant and machinery. The Vendor undertakes to accept payment of the purchase-money in cash or shares at the option of the Directors, but he stipulates that he may subscribe for and require the Directors to allot to him at least a third of the capital."

Who is the person that is styled "the Vendor"? William Henry Weekes, the attorney's clerk. As I have already pointed out, anyone reading this paragraph would naturally suppose that "the Vendor" was some responsible person, of commanding financial position and ability, not an attorney's clerk receiving as a salary a few pounds a week. But what did "the Vendor" stipulate? The prospectus tells us. "He stipulates," says the prospectus, "that he may subscribe for and require the directors to allot to him at least a third of the capital." That is to say, William Henry

Q. B. Div. 1898.

COMPONENTS TUBE CO. v. NAYLOR.

Sir P. O'Brien, L.C.J.

Weekes, the attorney's clerk, had stipulated to be at liberty to take one-third of the shares in a company having a capital of £150,000. Why, one would imagine that he was a Rothschild or an Iveagh! Mr. Purchase, the solicitor for the company, now informs us that the person who is described in the prospectus as "the Vendor" was a mere nominal vendor, that he was a mere conveyancing medium. But the prospectus does not state anything of the kind. The gentlemen who were the real promoters of this Company were Dr. Mac Cabe, Mr. Harvey Du Cros, junior, and Mr. Bulger. The evidence in the case I think clearly establishes this. These were the persons that were principally managing the transaction of these sales and the formation of the plaintiff company; and it was, in my opinion, in order to keep the names of these gentlemen out of sight, and to represent that the person selling was some other person of financial position and ability that the expression "the Vendor" was introduced into the prospectus. It was plain upon the evidence of the defendant that he would have had nothing to say to anything in which Mac Cabe and Bulger were concerned; and the jury found that the omission of the names of the real principals was misleading: indeed they found, as I have already pointed out, that the prospectus as a whole "was substantially misleading and calculated to deceive."

But I must return to the prospectus. It uses the following language:—

"The Company has been fortunate in securing the valuable services of Mr. Harvey Du Cros, junior, who has undertaken to give every assistance in his power, and to at all times place the benefit of his experience at the disposal of the Directorate. The Vendor, fully recognizing the great importance of Mr. Du Cros' experience, has, at his own expense, entered into a contract with Mr. Du Cros, securing his services, as above, to the Company."

Any person reading this paragraph of the prospectus would believe that a responsible vendor—some one whose financial and commercial experience had enabled him to exercise a wise judgment—had engaged the services of Mr. Harvey Du Cros at a reasonable figure for the benefit of the company; whereas the fact was that "the Vendor" was the attorney's clerk before referred

to; and that the enormous sum of £10,000 was agreed to be given to Du Cros by the persons, who, as I have stated, were the three principal promoters, namely, Dr. Mac Cabe, Bulger, and Harvey Du Cros, junior, himself.

It has been contended that, as there are some contracts very meagrely referred to towards the end of the prospectus, the dates and the names of the parties being alone given, the defendant might have ascertained the real nature of the various transactions from these documents, and that therefore he cannot complain that he was defrauded. By far the greater part of the capital of the company was applied for in Ireland, and was from the first intended so to be. The contracts so very meagrely referred to were in the offices in London of the plaintiff company's solicitor, and it was there that the prospectus said they might be inspected. The jury very naturally found that it was contemplated that a large proportion of applicants would rely on the prospectus without reading the contracts.

With reference to this contention of the plaintiff company, the language of Lord Watson, when giving judgment in the case of *Aaron's Reefs Company* v. *Twiss* (1), is most valuable. He says:—

"It was argued for the company, that inasmuch as its contracts are generally referred to towards the end of the prospectus, the respondent must be held to have had notice of their contents. That appears to me to be one of the most audacious pleas that was ever put forward in answer to a charge of fraudulent misrepresentation. When analyzed, it means simply that a person who has induced another to act upon a statement made with intent to deceive, must be relieved from the consequences of his deceit if he has given his victim constructive notice of a document, the perusal of which would have exposed the fraud."

Such is the language of Lord Watson. In the present case, the character of the reference to the contracts and of the offer of the means of inspection, were, in my opinion, but a portion of the fabric of fraud so ingeniously constructed. A jury might well have thought so.

But, independently of the suppression of the so-called two deals, and of the various representations and suppressions as to "the

(1) [1896] A. C. 273, 287.

Q. B. Div. 1898. COMPONENTS TUBE CO. v. NAYLOR. Sir P. O'Brien, L.C.J.

Vendor," there is other evidence in the case amply sufficient to sustain a verdict for the defendant. The prospectus, in one of its paragraphs, states as follows:—

"It will be thus seen that the Company starts under most favourable and exceptional circumstances. In addition to its already large *clientèle*, new and important markets are being exploited."

What was this large *clientèle* that was held up to the gaze of investors? It is alleged in the prospectus that "orders for tubing at remunerative prices" from certain specified companies, thirteen in all, had been obtained. All these orders but one were apparently whipped up just when the company was about to be launched. Some of them were obtained by underwriting transactions at an abnormal figure. In one of the orders, namely, the Swift order, delivery could not be compelled if the Swift Cycle Company declined to take it; and the Riley Company's order is plainly one which might be quite the reverse of remunerative, for the prices were not to be higher than those charged at the time of delivery by other manufacturers. So, if there was a "slump," nothing could be made on these so-called remunerative orders.

The jury might well consider that these orders, though put forward in the prospectus as representing fair instances of legitimate and remunerative dealings, were not so in fact. What else have we? The prospectus further states as follows:—

"In addition" (it says) "to these orders, the Cycle Components Manufacturing Company, Limited, has undertaken to take the whole of the balance of the output for the current season, after all orders received by the Company have been satisfied."

One reading this paragraph would suppose there was a *binding* contract to take the balance of the output referred to in it, when there was in fact no contract at all.

I must refer to one more paragraph in the prospectus. It states that—

"The Cycle Components Manufacturing Company, Limited, one of the largest consumers of weldless steel tube, has also undertaken to purchase, at remunerative prices to this Company, its full requirements for the subsequent two years."

It is true that there was a contract entered into with the Cycle Company, but that contract provided that they were to get the maximum discount allowed in the trade at the date of the specification of the orders—a provision which might render the contract anything but a remunerative one for the plaintiff company. This provision was not set out in the prospectus.

There is one matter more in the prospectus to which it is right to refer. It is stated that the property to be acquired by the company was—

"Held under lease for twenty-one years from the Cycle Components Manufacturing Company, at an annual rental of £400 with the option of renewal or purchase on very favourable terms."

What were the facts? The right of purchase was limited to the first five years after the company was launched, and the so-called right of renewal was dependent on the option of the *lessors* to grant it. In fact the so-called right of renewal was absolutely illusory.

It is quite plain that the jury were fully warranted in holding that the prospectus as a whole was substantially misleading and calculated to deceive, and also fraudulent.

With reference to the point, so much pressed by Mr. Ronan, that the speech of Mr. Harvey Du Cros, senior, was not evidence, it will be seen that the grounds I have indicated—the two transactions of alleged sale and purchase within twenty-four hours of each other—the difference in price of the two so-called deals—the various statements as to the "*clientèle*" of the plaintiff company—and the statement as to the lease under which the premises were held—are wholly independent of Mr. Du Cros' speech. My own opinion is that it was not evidence, at least for the purpose for which the defendant's counsel seem to me to have sought to have used it, namely, as substantive evidence to show that the business was not a profitable and extending one; but the plaintiff company's position is very anomalous as regards that speech. It was argued that my brother Gibson's address to the jury was so masterful that it entirely carried them away, and that he wrongly referred to Mr. Du Cros' speech. But what do I find? I find that, in his charge to the jury, he told them that on the

Q. B. Div. 1898.

COMPONENTS TUBE CO. v. NAYLOR.

Sir P. O'Brien, L.C.J.

whole he thought Mr. Du Cros' speech made in favour of the company.

The main grounds upon which this verdict should rest, and which I have dealt with at length, are wholly independent of the question of the admission or rejection of evidence, even if the latter point as to the rejection of evidence had been taken in the notice of motion. There were much more plausible grounds for setting aside the verdict in the case of *Powell* v. *Heffernan* (1), to which I invited the attention of counsel during the argument, yet in that case the verdict was not disturbed. Any other verdict than that found by the jury in this case would be set aside—the verdict was plainly right, and the plaintiffs' motion to set it aside should be refused with costs.

PALLES, C. B.:—

This is an action for calls on shares.

The defence is that the prospectus issued by the plaintiff company, which induced the contract to take the shares, was so misleading as to entitle the defendant to rescind it, and that he did so within a reasonable time after the discovery of the truth. It has been found by the jury, and that finding has not been substantially objected to, that the repudiation of the contract was within a reasonable time. Therefore, if the procedure at the trial were admitted to be in all respects regular, the only question for us would have been whether there was evidence that the prospectus was one of such a character as to entitle the defendant to rescind.

The plaintiffs, however, in addition to insisting that there was no such evidence, further rely upon two subsidiary matters. They say, first, that illegal evidence was received, and legal evidence rejected: and, secondly, that the entire trial proceeded upon a wrong basis—that the true question was either not tried at all, or that it was mixed up with other questions which did not arise, the introduction of which materially prejudiced their case with the jury.

There are, then, three matters for decision. They necessarily

(1) 8 L. R. Ir. 130.

must be dealt with separately; and I shall take first that which arises upon the prospectus. I do so without regard to the particulars of fraud relied on in the pleadings, in consequence of the reservation at the trial as to amendments.

After the incorporation of the company, the directors adopted the prospectus which had been previously prepared, issued it to the public, and upon the faith of it obtained a subscription from the defendant. Those directors were the agents of the company, and, in issuing the prospectus, they acted within the scope of their authority as such.

The defendant alleges: first, that the prospectus contains representations of fact which were untrue to the knowledge of the directors, or some of them, that is, fraudulent misrepresentations; secondly, that the directors concealed from, and omitted to state in the prospectus material facts which were within their knowledge, and which it is reasonable to hold would, if stated, have so operated upon the minds of those to whom the prospectus was addressed as to prevent them from applying for shares.

From the scope of the argument before us, I am driven to refer to principles absolutely elementary. What is the principle upon which a contract such as this, made by a company, is voidable, if induced by the fraud of its directors? It is not that the fraud of the directors is imputed to the company, but it is that even an innocent person is not permitted to retain a benefit obtained through the fraud of an agent, if the contract be repudiated within a reasonable time. Such a principal is not liable in an action for damages for the fraud of his agent, but, in relation to retaining a benefit obtained through the fraud, he cannot be in a better position than the fraudulent agent himself. The law is luminously stated by Lord Selborne in *Houldsworth* v. *City of Glasgow Bank* (1).

"In equity, one of the main heads of which has always been the redress of fraud, the constructive imputation of fraud to persons not really guilty of it has never been treated as a ground of relief, though the law of agency was administered according to the same rules in equity as at common law, and though in equity, as well as at law, an innocent principal might suffer for the

(1) 5 App. Cas. 317, p. 328.

Q. B. Div. 1898.

COMPONENTS TUBE CO. v. NAYLOR.

Palles, C.B.

fraud of an agent . . . Vice-Chancellors Knight Bruce and Parker, and Lord Chancellor Campbell (all very eminent Judges), said (as Lord Cranworth and Lord Chelmsford also said in this House), that the law does not impute the fraud of directors to a company; and the same proposition would, I apprehend, be equally true, in the sense in which they intended it, if the principal whose agent was guilty of fraud were not a corporation, but an individual. The real doctrine which Lord Cranworth, in *Addie's Case* (1), meant (as I understand him) to affirm, was one of substance and not of form: 'An attentive consideration' (he said) 'of the cases has convinced me that the true principle is that these corporate bodies, through whose agents so large a portion of the business of the country is now carried on, may be made responsible for the frauds of those agents, to the extent to which the companies have profited by those frauds, but that they cannot be sued as wrongdoers, by imputing to them the misconduct of those whom they have employed.' . . . The words in this passage, 'to the extent to which the companies have profited by those frauds,' may perhaps require some enlargement or explanation; but, subject to that qualification, I am of opinion that this doctrine is in principle right."

The same principle is thus stated by Lord Hatherley in the same case (2):—

"I think that the following points may be considered as concluded by authority; at all events, I shall assume them so to be for the purposes of the case before the House. First, that an agent, acting within the scope of his authority, and making any representation whereby the person with whom he deals on behalf of his principal is induced to enter into a contract, binds his principal by such representation *to the extent of rendering the contract voidable*, if the representation be false, and the contracting party take proper steps for avoiding it whilst a *restitutio in integrum* is possible. Secondly, that a corporation is bound by the wrongful act of its agent, no less than an individual, and that, such misrepresentation by the agent being a wrongful act, the result of such misrepresentation must take effect in the same manner against the corporation as it would against an individual."

The company being thus, *quoad* the rescission of the contract, responsible for the frauds of its directors, the next question is, Was there evidence that the directors were guilty of fraud? To determine this question, it is essential to consider what is the exact obligation of the company to those whom it invited to apply for its shares?

In my opinion, the answer to that question is to be found in

(1) L. R. 1 H. L., Sc. 145. (2) 5 App. Cas. p. 331.

the words of Sir Richard Kindersley, V.C., in *The New Brunswick and Canada Railway Co.* v. *Muggeridge* (1), a case decided so far back as 1860.

"It appears to me" (says the Vice-Chancellor) "that it is quite necessary to uphold this as a principle: that those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but *to omit no one fact* within their knowledge, the existence of which might *in any degree affect* the nature, or extent, or quality of the privileges and advantages which *the prospectus holds out* as inducements to take shares."

That case was one of specific performance; but the principle laid down in it was in 1867 extended by the House of Lords to, and acted upon in, a suit in which the question was identical with that which we have to determine, the right to rescind a contract for fraud. In giving judgment in *The Central Railway Company of Venezuela* v. *Kisch* (2) Lord Chelmsford, C., said:—

"But although, in its introduction to the public, some high colouring, and even exaggeration, in the description of the advantages which are likely to be enjoyed by the subscribers to an undertaking, may be expected, yet no misstatement or *concealment* of any material facts or circumstances ought to be permitted. In my opinion, the public, who are invited by a prospectus to join in any new adventure, *ought to have the same opportunity of judging* of everything which has a material bearing on its true character *as the promoters themselves possess*. It cannot be too frequently or too strongly impressed upon those who, having projected any undertaking, are desirous of obtaining the co-operation of persons who have no other information on the subject than that which they choose to convey, that the utmost candour and honesty ought to characterize their published statements. As was said by Vice-Chancellor Kindersley, in the case of *The New Brunswick and Canada Railway Company* v. *Muggeridge* (1), 'Those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge, the existence of

(1) 1 Dr. & S. 363, 381. (2) L. R. 2 H. L. 99, 113.

Q. B. Div. 1898. COMPONENTS TUBE CO. v. NAYLOR. Palles, C.B.

which might in any degree affect the nature, or extent, or quality of the privileges and advantages which the prospectus holds out as inducements to take shares.'"

I have deliberately, and at the risk of repetition, repeated the words of Lord Chelmsford, referring to Vice-Chancellor Kindersley's judgment, because by the use of the words "as was said by" the Vice-Chancellor, he makes the words of the Vice-Chancellor part of his own judgment, and thus, deliberately, with his high authority as Lord Chancellor, sitting in the House of Lords, lays down the above principles of law for the future guidance of all subordinate tribunals. The Lord Chancellor then proceeds to apply "these principles" to the prospectus there in question.

Lord Cranworth's judgment is also based upon concealment. This appears from the words he used there, but much more clearly from his opinion in *Oakes* v. *Turquand* (1). In the latter case, referring to his opinion in *The Central Railway Company of Venezuela* v. *Kisch* (2), he says (3) :—

"The question there was, whether, as between Kisch, the respondent, and the company, he was to be treated as a shareholder. This House held that he was not. He had been imposed upon by means of a *fraudulent concealment* of something which the company ought to have disclosed. The company contended that he must be taken to have known the facts which were *concealed* from him, for that those facts appeared on the face of the articles of association. . . . I thought that such an argument did not lie in the mouth of the directors; that they could not, by fraudulently *concealing* what they ought to have disclosed, induce a person to become a member, and then say, 'Your membership gives you, by force of the statute, knowledge which prevents you from alleging that there was fraudulent *concealment*.'"

Lord Romilly in *The Central Railway Company of Venezuela* v. *Kisch* (2) concurs in the observations and reasons of the Lord Chancellor and Lord Cranworth.

From these opinions I conclude that the judgment of the House proceeded upon the basis of the principles I have read from Lord Chelmsford's opinion. Surely, then, it must be

(1) L. R. 2 H. L. 325. (2) L. R. 2 H. L. 99. (3) L. R. 2 H. L. p. 368.

admitted that it is not competent to any subordinate tribunal, even to the Court of Appeal, to hold that the obligation of disclosure is less than that which was there so deliberately laid down. It may seem strange that I should make such an observation. I do so because, I regret to say, observations have been made in our Court of Appeal, which state the obligation as to disclosure to be of a lesser character; and some little confusion of verbiage, in a text-book of almost judicial authority (1), has caused in some a belief that the present Master of the Rolls in England has lent the sanction of his high authority to the notion that the obligation is of the lesser description. Were it not for the observations I have just referred to, it would be superfluous to show the extent to which this principle, affirmed by the House of Lords, has been acted upon in subordinate tribunals; but, having regard to the eminence of the Judges whose observations I know I shall have to encounter, I think it right not to omit reference to any one authority which supports my position.

I therefore call in aid a judgment of Lord Hatherley. In *Henderson* v. *Lacon* (2), that learned lord, when Vice-Chancellor, referred to the passage I have read from Vice-Chancellor Kindersley's judgment as

"That golden legacy . . . which has been left to us by Sir Richard Kindersley, who has condensed in a few words the whole doctrine as to the rule of conduct between shareholders and their directors, in the case of *The New Brunswick and Canada Railway Company* v. *Muggeridge* (3)."

In the recent case of *Aaron's Reefs* v. *Twiss* (4), Mr. Justice Andrews, in delivering a judgment which was afterwards affirmed by the House of Lords, having referred to the above authorities, uses the following words:—

"The justice of these judicial statements is apparent; they are unquestionably sound law; and, in the interests of commercial honesty, on which commercial prosperity so largely depends, they ought to be acted on without hesitation in every case to which they are properly applicable."

(1) Lindley on Company Law (Ed. 5), p. 70.
(2) L. R. 5 Eq. 249, 262.
(3) 1 Dr. & S. 363, 381.
(4) [1895] 2 Ir. R. 207, 229.

Q. B. Div. 1898. COMPONENTS TUBE CO. v. NAYLOR. Palles, C.B.

When that case was brought to the Court of Appeal, it was heard by four Judges, the then Lord Chancellor (now Lord Justice Walker), the Master of the Rolls, and the two Lords Justices. In delivering their judgments, each of those four Judges, with the exception of the Lord Chancellor, refers to *The New Brunswick and Canada Railway Company* v. *Muggeridge* (1), and *The Central Railway Company of Venezuela* v. *Kisch* (2). The Lord Chancellor does not expressly mention them, but I need not say that he does not hint that they are not binding in law, although, as I shall hereafter show, he failed to give effect to them. There was there a difference of opinion. The Lord Chancellor and the Master of the Rolls held that the judgment of the Exchequer Division was wrong; the two Lords Justices, upon the other hand, were of opinion that it was correct, and should be affirmed.

The real importance of the appeal decision there is to be gathered from the judgments of the Lords Justices, as their judgment was affirmed by the House of Lords. The Court had been pressed with an unreported judgment of Wright, J., in *Aaron's Reefs* v. *Broadhurst*, in which he is represented to have remarked as to *Muggeridge's Case* (1), that its strict rule would be fatal to most prospectuses of the present day; and that in the case then before him, although he did not consider the prospectus a candid one, the evidence had, to his mind, failed to show that it was *sufficiently* misleading to entitle the plaintiff to relief.

Lord Justice FitzGibbon, in reference to that decision, says (3):—

"On the question of fraud, in an action by a company, under such circumstances as we have here, I do not admit any distinction between such fraudulent concealment of material facts as took place here, and actual misrepresentation. The answer to Mr. Justice Wright's remark on *Muggeridge's Case* (1), viz. that its strict rule would be fatal to most prospectuses of the present day, is, with all respect,—'So much the better.' If a company cannot float if the whole truth be disclosed by its prospectus, it cannot be honestly launched at all."

(1) 1 Dr. & S. 363, 381. (2) L. R. 2 H. L. 99.
(3) [1895] 2 Ir. R. p. 269.

Later on he says (1) :—

"I dissent from the observations which disparage Vice-Chancellor Kindersley's judgment in *Muggeridge's Case*, notwithstanding the approval of it in subsequent cases, and in the House of Lords. In my opinion, a company inviting money on the faith of a prospectus is bound to state every known fact which, if disclosed, would prevent a prudent man from taking shares at all, and also every known fact which materially qualifies or alters the effect of the previous representations made to induce persons to subscribe."

Lord Justice Barry describes the passages I have cited from the judgment of Kindersley, V.-C., and the opinion of Lord Chelmsford, as "sound in law, in common sense, and in morals," and as to the expression alleged to have been used by Mr. Justice Wright, "that the prospectus was not sufficiently misleading," the Lord Justice observes (2) :—

"I must prefer the rule of sense, morality, and law, laid down by Vice-Chancellor Kindersley and Lord Chelmsford, to any conceivable practical system of gradation in fraud."

The case was ultimately taken to the House of Lords, where the views of the Lords Justices in the Court of Appeal were unanimously adopted (3) ; and three of the six learned lords by whom the case was heard adopted in all respects the judgment of Lord Justice FitzGibbon. Lord Macnaghten describes that judgment as "so complete in all respects, and so convincing," that he only proposes to add a few words. Lord Morris adopts it "in its entirety" ; while its "reasons" are adopted by Lord Davey.

Were there nothing more to be referred to, it would appear from what I have said that the wholesome and necessary principle approved of by the House of Lords in 1867 is at this moment as applicable to the affairs of life, and (let me add) as necessary to be upheld in the interests of honesty and morality, as when that House first added the weight of its great authority to the judgment of Kindersley, V.-C.

Unfortunately, however, there is something more to be mentioned ; for although there is no reported decision in which any Court, or any Judge, has ventured to directly attack the principle

(1) [1895] 2 Ir. R. p. 273. (2) *Ibid.* p. 283. (3) [1896] A. C. 273.

Q. B. Div. 1898.

COMPONENTS TUBE CO. v. NAYLOR.

Palles, C.B.

thus laid down, there remain the judicial observations, and the statement in the text-book to which I have referred, which, if adopted as *rationes decidendi*, will indirectly do that which it is incompetent to any Court to do directly, viz., over-rule *The Central Railway Company of Venezuela* v. *Kisch* (1), by so limiting the principle there established as to render it inapplicable to any case in which its assertion would be necessary. I refer to a passage in the work of the present Master of the Rolls in England on Company Law, and to the judgments of the Lord Chancellor and the Master of the Rolls in *Aaron's Reefs* v. *Twiss* (2). The views expressed in these judgments did not find acceptance in the House of Lords; but as the judgments of the House appear to proceed upon active misrepresentation—*suggestio falsi*, as distinguished from *suppressio veri*—I cannot rely upon the House of Lords' decision as over-ruling so much of the opinions of the Lord Chancellor and the Master of the Rolls as I proceed to refer to.

In the commencement of his judgment, the Master of the Rolls expressly recognises the cases to which I have referred (3).

"The principle" (he says) "of *uberrima fides*, as applicable to such cases as the present, is fully recognised, and is in terms enunciated by the highest authority in *The New Brunswick and Canada Railway Company* v. *Muggeridge* (4) and in *Kisch's Case* (1). But mere exaggeration is not enough to establish its violation; because the *uberrima fides* required is good faith as to the disclosure of material facts, as distinguished from opinions or prospects."

From this proposition I do not dissent. Then the Master of the Rolls proceeds in these words:—

"And the suppression, when suppression is relied on, must be of material facts, the non-disclosure of which renders what is stated untrue, that is, fraudulent, in the sense in which a Court of Equity would so regard it. And this is admitted in *Houldsworth* v. *Glasgow Bank* (5), *New Brunswick Company* v. *Conybeare* (6), and *Jackson* v. *Turquand* (7)."

If these words of the learned Master of the Rolls—of whom I need not say I speak with the most unfeigned respect—if these

(1) L. R. 2 H. L. 99.
(2) [1895] 2 I. R. 207.
(3) *Ibid.* p. 248.
(4) 1 Dr. & S. 363.
(5) 5 App. Cas. 317.
(6) 9 H. L. C. 711.
(7) L. R. 4 H. L. 305.

words accurately state the law, then the principle affirmed by the House of Lords, in *The Central Railway Company of Venezuela* v. *Kisch* (1), has been abrogated, and is no longer law. It is impossible to contend that the duty to disclose every fact within one's knowledge, the existence of which may "in any degree affect the nature, or extent, or quality of the privileges and advantages held out," so that the public shall have "the same opportunity of judging of everything which has a material bearing on the true character of the undertaking as the promoters themselves possess," is identical with a duty limited to the disclosure of "material facts, the non-disclosure of which renders what is stated untrue." To treat them as identical is, in my mind, to confuse concealment with active misrepresentation. In construing a written document, you cannot take separately any particular sentence, and determine its effect, without regard to the rest of the writing. Whether a particular representation is or is not made, must be determined upon the combined effect of everything contained in the writing taken as a whole; and if there is a particular omission in the document, which, in popular language, *renders* what is stated untrue, it follows that that which is stated is in fact untrue, because it is not guarded by the limitation rendered necessary by the omitted statement. Such a statement, if material, would be sufficient to give a right to rescind a contract, in a case in which there was no duty to disclose, such, for instance, as one to which the maxim of *caveat emptor* applied. But even were this otherwise, the extent of the subject-matter to which the duty to disclose extends is different in the two cases.

Holding this opinion, as I do, strongly, I confess I was surprised when I found three cases in the House of Lords itself referred to by the Master of the Rolls as admitting this principle, each of which, if it did admit it, would necessarily have been in antagonism with the decision of the same House in *The Central Railway Company of Venezuela* v. *Kisch* (1).

Accordingly, since the argument, I thought it my duty to read and re-read every word of these three decisions, and I am unable to find one single word which lends countenance to the

(1) L. R. 2 H. L. 99.

Q. B. Div. 1898. COMPONENTS TUBE CO. v. NAYLOR. Palles, C.B.

doctrine which it is stated they admit; unless possibly it be in the following interlocutory observation of Lord Westbury, C., in *The New Brunswick and Canada Railway Company* v. *Conybeare* (1). When, in that case, the respondent's counsel insisted that the appellants were bound to communicate a certain opinion of counsel at the time it was alleged they had made a representation to an opposite effect, the Lord Chancellor is reported to have said:—

"In Sugden's Vendors and Purchasers (2), it is said, 'Moral writers insist that a vendor is bound, *in foro conscientiæ*, to acquaint a purchaser with the defects of the subject of the contract,' and Cicero, *De Officiis* (3), is referred to. But the learned author goes on to say: 'Our law does not entirely coincide with this strict precept of morality.'"

The counsel answers him:—

"Nor does the respondent here insist on that strict rule, which, indeed, the circumstances have shown to have been entirely disregarded. But he was entitled to have the truth as to all the representations that were made."

The Lord Chancellor again interrupts, and says:—

"In the same passage it is said that 'if the purchaser was ignorant of the defects, and the vendor acquainted with them and did not disclose them to the purchaser, yet if they were *patent*, and could have been discovered by a vigilant man, no relief will be granted against the vendor.'"

Now, in these observations, which were merely interlocutory, and formed no part of his judgment, the Lord Chancellor referred to a case of vendor and purchaser, to which the maxim of *caveat emptor* applied, and in which there is no duty to disclose anything. But, if *The Central Railway Company of Venezuela* v. *Kisch* (4) decided anything, it must have included this, that the doctrine of *caveat emptor* does not apply to a case of this description, because there is a duty to disclose something. When, however, we come to the considered opinion of the Lord Chancellor, we find that the principle to which he had thus interlocutorily referred finds no place in it. The suppressions relied on there, as distinct from active misrepresentations, were the suppression from the respon-

(1) 9 H. L. C. 711, pp. 721, 722.
(2) page 1.
(3) Bk. III., cap. 13.
(4) L. R. 2 H. L. 99.

dent of—1, an Act of the Colonial Legislature, by which it was alleged that the title of the Company to certain lands was made defeasible, and 2, an opinion, given by Mr. Bullar, upon a case laid before him by the directors, in which he stated that the land was liable to forfeiture in the event of the non-completion of the line by a particular day.

"I think" (says the Lord Chancellor) (1) "it is perfectly clear that there was not only no suppression of this Act of the Legislature, but I think it is equally clear that the Act does not warrant the conclusion contended for by the respondent."

Later on he adds—

"The attempt, therefore, to allege a case of suppression, in the face of such facts as these, is an attempt which is altogether futile."

And he sums up the effect of his opinion in these words :—

"I think the conclusion originally ought to have been that there was no ground for imputing to the directors fraudulent representation or fraudulent withholding of any material fact."

Lord Cranworth's opinion is based upon this, that the Lords Justices had given relief because of a representation (relied on as fraudulent), that the company had a good title to the land, and that they had done so without determining that they had not a good title. Having then proceeded at some length to show that opinions he had previously expressed in *Ranger* v. *Great Western Railway Company* (2) and *National Exchange Bank of Glasgow* v. *Drew* (3), were correct (a matter which need not be referred to here), his *ratio decidendi* is contained in these words (4)—

"Adhering, therefore, to these opinions, I nevertheless concur entirely with my noble and learned friend, that the facts of this case are not such as to render any such principle applicable at all."

Lord Chelmsford, to whose judgment in the subsequent case I have already so often referred, appears, when stating his

(1) 9 H. L. Cas. 734.
(2) 5 H. L. C. 73, 86.
(3) 2 M'Queen Sc. App. Cas. 103.
(4) 9 H. L. C. p. 740.

Q. B. Div. 1898.

COMPONENTS TUBE CO. v. NAYLOR.

Palles, C.B.

opinion in this case, to have had the principle in view which he afterwards so clearly enunciated. He says (1) :—

"With respect to the opinion of Mr. Bullar, I wish to guard myself against it being supposed that I acquiesce entirely in the view presented to your Lordships that it was not necessary for the appellants, having the opinion of their conveyancer that their title was a doubtful one, to communicate that to the respondent. If the appellants had withheld intentionally from the respondent the Act of the 19th Vict., upon which the doubt as to the title arises, then I think it would have been a very undue and improper concealment not to communicate to him the fact that Mr. Bullar had given his opinion that the title was a doubtful one."

And he sums up his opinion (2)—

"It is sufficient to dispose of this case by saying that there is no proof whatever of any misrepresentation, and that the only ground as to supposed misrepresentation upon which the Lords Justices have proceeded, that is, with regard to the title to the lands being doubtful, is entirely removed. There is no doubt whatever, that the title is a good and absolute, and indefeasible title."

This case, therefore, does not admit the principle in support of which it is relied upon by the Master of the Rolls.

In *Jackson* v. *Turquand* (3) the misrepresentation relied on was that of the directors of a Banking Company who issued a report declaring a dividend of 15 per cent. upon the shares, with a bonus of 10 per cent. Four months afterwards, they offered the shareholders the option of taking, according to the proportion of shares held by each, certain reserved shares, at a premium. The case was one of alleged misrepresentation, not of concealment; and the *ratio decidendi* of the Lord Chancellor (Lord Hatherley), was expressed in these words (4)—

"We find nothing whatever upon the evidence before us to satisfy us that any misrepresentation whatever was made by the directors, or if it was so made, that it was made to their knowledge, or with such a degree of carelessness or negligence on their part in inspecting the accounts and concerns of the company, as to amount to a necessary implication of knowledge on their part of the misrepresentations being false."

(1) 9 H. L. C. p. 742.
(2) *Ibid.* p. 750.
(3) L. R. 4 H. L. 305.
(4) L. R. 4 H. L. p. 309.

To the same effect is the opinion of Lord Westbury (1) :—

"There is nothing whatever in this case to show that the parties who made such a representation knew, or ought to have known, that it was false. There has been nothing suggested as showing anything like *malus animus*, or anything like neglect in ascertaining what they represented to be the fact."

I can find nothing in the case in relation to fraudulent concealment. This case, therefore, does not admit or proceed upon the basis of the suggested limitation of the duty of disclosure.

The third case referred to by the Master of the Rolls is one from which I have already largely quoted in this judgment, *Houldsworth* v. *City of Glasgow Bank* (2). The question there was, whether one who became a shareholder upon the fraudulent misrepresentation of the directors of the company could, after the commencement of a winding up, when rescission of the contract and *restitutio in integrum* had become impossible, bring an action for damages against the company. The decision was that the action was not maintainable. I cannot find that the principle in question here was at all referred to.

I pass now from the judgment of the Master of the Rolls, in *Aaron's Reefs* v. *Twiss* (3), to that of the then Lord Chancellor, who arrived at the same conclusion as the Master of the Rolls. He based his judgment upon the passage in the work of the present Master of the Rolls in England on Company Law (4), and upon *Gover's Case* (5). In Lindley on Company Law, there is the following statement (4) :—

[1.] "In all contracts of buying and selling the maxim is *caveat emptor*; and contracts to take shares are *apparently* governed rather by this principle than by any other." [2.] "At the same time, if persons issue prospectuses, or make statements, and fraudulently suppress material facts which render the statements made untrue, an *action for damages* may be sustained against them." [3.] "*A fortiori*, will such a concealment support an action for rescission of contract. But" [4] "*such an action* cannot apparently be supported by a person induced to take shares by the concealment of a material fact unless there has been some untrue statement."

(1) L. R. 4 H. L. p. 315.
(2) 5 App. Cas. 317.
(3) [1895] 2 Ir. R. 207, p. 229.
(4) Lindley on Company Law, 5th Edition, p. 70.
(5) 1 Ch. D. 182.

Q. B. Div. 1898.

COMPONENTS TUBE CO. v. NAYLOR.

Palles, C.B.

In my opinion, the first sentence refers to ordinary sales and purchases of shares, to sales where there is no duty as to disclosure, and no fiduciary relation between vendor and purchaser. The matter pointed at seems to be that, notwithstanding the essential differences between any other chattel and a share, the ordinary rule as to purchases and sales applies where the subject of the sale is a railway share. The third proposition appears to have been interpolated between the second and fourth, which are, I think, intended to be read together, so that "action," in the fourth sentence, refers, not to an action for rescission, but to the more distant antecedent, an "action for damages," and that the learned author did not intend to apply the last proposition thus put by him to an action for rescission, as distinguished from an action for damages for deceit. This, I think, appears clearly from an examination of the cases referred to in support of the propositions. I have carefully read each of these cases, and also *Gover's Case* (1), and I am satisfied that, so far from any of them supporting the position there laid down, if it be taken to refer to or include actions for rescission, they establish the contrary. As, however, a bald negative statement on my part would be wholly insufficient to outweigh the authority of the Master of the Rolls in England, supported as it is by that of our Master of the Rolls and of Lord Justice Walker, it is due to myself that I should discuss those cases in detail.

The cases referred to in the notes are *Twycross* v. *Grant* (2), (in which the author says that reasons are given against the view expressed in the text), *Pulsford* v. *Richards* (3), *Oakes* v. *Turquand* (4), *Peek* v. *Gurney* (5), *New Sombrero Phosphate Company* v. *Erlanger* (6), an observation of Lord Blackburn in *Houldsworth* v. *City of Glasgow Bank* (7) and *Arkwright* v. *Newbold* (8).

The distinction is pointed out in the judgment in *Twycross* v. *Grant* (2), to which the author (then Lord Justice Lindley) was himself a party. As the case was determined upon the construc-

(1) 1 Ch. D. 182.
(2) 2 C. P. D. 469, 483.
(3) 17 Beav. 87.
(4) L. R. 2 H. L. 325.
(5) L. R. 6 H. L. 377.
(6) 5 Ch. D. 73; 3 App. Cas. 1218.
(7) 5 App. Cas. 317, 324.
(8) 17 Ch. D. 301.

tion of section 38 of the Act of 1867, I shall say no more in reference to it, than that the Lord Chief Justice (Lord Coleridge), in delivering the judgment of the Court, points out at some length the distinction between an ordinary purchase and the purchase from a company of some of its shares (1).

"It is utterly immaterial" (he says) "to an ordinary purchaser to know what the vendor will do with the purchase-money when he gets it. The purchaser has no further interest in it. But an applicant for shares in a company is in a totally different position. His money becomes part of the capital of the company, and to him it is all important to know what sort of persons are to have the control of his money when he has paid it, and how that money is to be applied, whether upon the enterprise itself or in remunerating, perhaps with lavish extravagance, those who have brought the company into existence."

The distinction between the two contracts is further accentuated by Earl Cairns in the House of Lords, in *Houldsworth* v. *City of Glasgow Bank* (2)—

"We are accustomed to use language as to such a sale and purchase as if the thing bought or sold were goods or chattels, but this it certainly is not. The contract which is made is a contract by which the person called the buyer agrees to enter into a partnership already formed and going, taking his . . . chance of future profits or losses. He has not bought any chattel or piece of property for himself; he has merged himself in a society, to the property of which he has agreed to contribute, and the property of which, including his own contributions, he has agreed shall be used and applied in a particular way and in no other way."

I shall refer to the other cases in the order of date.

Pulsford v. *Richards* (3), a decision in 1853 of Lord Romilly, M.R., so far from establishing the proposition for which it is cited, is an authority the other way. There Lord Romilly says:—

"With respect to the character or nature of the representation itself, it is clear that it may be positive or negative, that it may consist as much in the suppression of what is true as in the assertion of what is false. . . . To use the expression of the Roman Law, much commented on in the argument before me, it must be a representation *dans locum contractui*—that is, a representation in connexion with the contract, the proper interpretation of which appears to me

(1) 2 C. P. D. 469, 483.
(2) 5 App. Cas. 317.
(3) 17 Beav. 87.

Q. B. Div. 1898.

COMPONENTS TUBE CO. v. NAYLOR.

Palles, C.B.

to be the assertion of a fact on which the person entering into the contract relied, and in the absence of which it is reasonable to infer that he would not have entered into it; or"

(And here come words, identical with those used by Lord Chelmsford, Sir Richard Kindersley, Lord Justice Fitz Gibbon, Lord Justice Barry, and Mr. Justice Andrews)—

"or the *suppression* of a fact the knowledge of which it is reasonable to infer would have made him *abstain* from the contract altogether."

Next, in order of time, is *Oakes* v. *Turquand* (1). The decision in that case was that it was too late, after an order had been made for the winding-up of a company, under the Act of 1862, for an allottee of shares to seek relief from his contract upon the ground of the fraudulent misrepresentations of directors, or their fraudulent concealment of facts. In stating his opinion there, Lord Chelmsford, C., says (2):—

"I entertain no doubt, however, that the directors were honestly and sincerely of opinion that if they could procure additional capital, and could carry on some of the business of Overend, Gurney, & Co., on a healthier system, the company would succeed. But as the experiment was to be made with other people's money as well as with their own, I think they were *bound to furnish to others the information which they possessed themselves*, and so enable others to form a competent judgment as to the prudence of embarking in the new concern. If this had been a case between Oakes and the company, in which he sought to be relieved from his contract, as in *The Central Railway Company of Venezuela* v. *Kisch* (3), or the company had been suing him for calls, as in *The Bwlch-y-Plwm Lead Mining Company* v. *Baynes* (4), he would have succeeded in the one case, and the company would have failed in the other, on the ground which, I venture to think, was correctly laid down in the recent case of *The Western Bank of Scotland* v. *Addie* (5) in this House—that 'where a person has been drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations (*and I would here add "by fraudulent concealment"*) of the directors, and the directors seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the purchaser cannot be held to his contract, because the company cannot retain any benefit which they have obtained through the fraud of their agent.'"

(1) L. R. 2 H. L. 325.
(2) *Ibid*, p. 344.
(3) L. R. 2 H. L. 99.
(4) L. R. 2 Ex. 324.
(5) L. R. 1 H. L. (Sc.) 145.

So far, then, from this case establishing the proposition contended for, it is an authority the other way; and so is the case next in order of date, *Peek* v. *Gurney* (1). That was a suit which was held to be, in substance, an action for damages against the directors who issued the prospectus, a suit against the company having been rendered impossible by a winding-up order. It was heard by Lord Chelmsford, Lord Colonsay, and Lord Cairns; and both Lord Chelmsford and Lord Cairns took pains to distinguish such a suit from an action such as that now before us. Lord Chelmsford says (2)—

"The question, however, is not as to the moral obligation of the respondents, but whether their intentional concealment, from whatever motive, of a fact so material that if it had been made known no company could have been formed, renders them liable to an action for damages . . . by the appellant, who was led by it to purchase shares in the company . . . This case is entirely different from suits either to be relieved from, or for the enforcement of, contracts induced by the fraudulent *concealment* of facts which ought to have been disclosed . . . It is precisely analogous to the common law action for deceit."

To the same effect is the opinion of Lord Cairns (3) :—

"Mere non-disclosure of material facts, however morally censurable, *however that non-disclosure might be a ground* . . . in a proper proceeding . . . *for setting aside an allotment or a purchase of shares*, would in my opinion form no ground for an action in the nature of an action for misrepresentation."

Gover's Case (4) is in many respects a remarkable one; and the remarks upon it, in the subsequent case of *The New Sombrero Phosphate Company* v. *Erlanger* (5), of James, L. J., who was a party to it, show that it has no application here. In it Miss Gover sought to have her name removed from the list of shareholders of a company which had been formed to purchase from one Mappin, for £125,000, a patent which Mappin had, three months previously, agreed to purchase from Skoines, for £65,000. The first agreement was not disclosed in the prospectus; and in that respect the case has some resemblance to the present. The application was made on two grounds: 1, that the earlier agreement was within section 38 of the Act of 1867; and 2, that, irrespective of the statute,

(1) L. R. 6 H. L. 377.
(2) *Ibid.* p. 390.
(3) *Ibid.* 403.
(4) 1 Ch. D. 182.
(5) 5 Ch. D. 73.

Q. B. Div. 1898.

COMPONENTS TUBE CO. v. NAYLOR.

Palles, C.B.

the omission to disclose entitled the applicant to rescind. The greater part of the judgments relate to the construction of section 38, and the unanimous decision there established that which has ever since been recognised as sound law, that a breach of that section is not necessarily a ground for rescinding the contract, and that the remedy for the breach, if there be nothing else in the case, is by action of deceit against the persons issuing the prospectus. Upon the second question, the only one material here, viz., whether the applicant was entitled to be relieved irrespective of the statute, the *ratio decidendi* of James, L. J., and Bramwell, B., was that, as matter of fact, Mappin was not a promoter of the company at the time the first contract was entered into; and, as matter of law, that the fiduciary relation, which is the basis of the obligation to disclose, must exist at the time of the first contract. James, L. J., says (1) :—

"The making of that provisional contract was, in my opinion, the first period of time at which it could be said that the company had even an inchoate existence; and it was from and after the making of that contract that any fiduciary or other relation between Mappin and the company began. In the making of that contract, in presenting his own terms and conditions, he was, according to my judgment, in the position of any ordinary vendor with any ordinary purchaser. Everything anterior to that was a matter relating to himself, and to his own title as vendor."

He adds (2) :—

"No doubt a company is liable to have its contracts with its shareholders rescinded, if the prospectus contains false statements, or omissions amounting in substance to false statements. But if the prospectus does not in fact contain any such false statement, or any omission which in fact amounts to such false statement, it seems to me it would work a grievous wrong and injustice if the company were to be affected thereby."

Lord Justice Mellish differs from the view of James, L.J. He considers that the material period at which the fiduciary relation is to be sought is when the company adopts the contract. He says (3) :—

"Now, when the company became the purchasers of the patent, that is to say, when the directors, after the formation of the company, adopted the contract made by Mappin with Wright, Mappin was both a promoter and

(1) 1 Ch. D. p. 187. (2) *Ibid.*, p. 189. (3) *Ibid.*, p. 191.

director. . . . The purchase of the patent by the company . . . enabled him without the knowledge of the company to fulfil his contract with Skoines, and to earn an enormous profit."

He consequently was of opinion that the company were entitled to the benefit of that contract.

The *ratio decidendi* of Lord Esher (then Brett, L.J.), upon the second point, is stated in these words (1):—

"It seems to me that the concealment or non-disclosure of the contract of July did not make the disclosure of the contract of October a misrepresentation."

In reference to the general law, as it stood before the passing of the statute, he says (2):—

"If a subscription for shares were obtained by a misrepresentation of facts, though not fraudulently made, a Court of Equity would prevent the company from compelling payment of a call, would compel restitution of money paid for a call, and would remove the name from the register of shareholders. But for a mere non-disclosure, fraudulent or otherwise, which had not the effect of rendering that which was disclosed or stated a misrepresentation, however otherwise important for the consideration of an invited subscriber, there was no remedy either in law or equity if he became a registered shareholder."

This is the first case which I have been able to find, in which an attempt is made to limit the subject-matter of the obligation to disclose to something less than that which, in *The Central Railway Company of Venezuela* v. *Kisch* (3) the House of Lords had declared it to be. Possibly, if the expressions in the judgments there were, in all respects, good law, and applicable to such a case as the present, they might support the view of the Master of the Rolls and the late Lord Chancellor in *Aaron's Reefs* v. *Twiss* (4), of which they probably were the genesis, and the passages I have referred to from Lord Justice Lindley on Company Law (5th Edition), p. 70.

If *Muggeridge's Case* (5) and *The Central Railway Company of Venezuela* v. *Kisch* (6) had been referred to in the argument

(1) 1 Ch. D. p. 189.
(2) *Ibid.*, p. 199.
(3) L. R. 2 H. L. 99.
(4) [1895] 2 Ir. R. 207.
(5) 1 Dr. & Sm. 363.
(6) L. R. 2 H. L. 99.

Q. B. Div. 1898. COMPONENTS TUBE CO. v. NAYLOR. Palles, C.B.

before the Lords Justices in *Gover's Case* (1), I would decline to attribute to them an intention of doing that to which I know they would never willingly be parties, of refusing to act upon a principle affirmed by the House of Lords. Had such been the case, I should have held that, whilst admitting the principle to its full extent, they for some reason considered it inapplicable there. But neither *Muggeridge's Case* (2) nor *The Central Railway Company of Venezuela* v. *Kisch* (3) were cited nor do they appear to have been present to the mind of any of the learned Lords Justices.

Surely this case, even were there no subsequent decision inconsistent with it, would afford me no justification for refusing to act upon a principle laid down by the House of Lords.

But there is a subsequent decision, and one to which Lord Justice James himself was a party, which places the law upon its true basis, and which is inconsistent with *Gover's Case* (1) if it is to be read as affecting the principle of *The Central Railway Company of Venezuela* v. *Kisch* (3). I refer to *The New Sombrero Phosphate Company* v. *Erlanger* (4). It was a decision of Sir George Jessel, Lord Justice James, and Lord Justice Baggallay, which was affirmed in the House of Lords by Lord Cairns, C., Lord Penzance, Lord Hatherley, Lord O'Hagan, and Lord Blackburn; and in its circumstances had a strong similarity to the present. The question there was in reference to the purchase of an island in the West Indies, which on the 30th August, 1871, the liquidator of a company, then in the course of being wound up, contracted to sell for £60,000, subject to the sanction of the Court of Chancery, to one Evans, who was the agent of Baron Erlanger, and who purchased for a syndicate of speculators. This contract was confirmed by the Judge in chamber on the 15th September following; and upon the 20th of the same month Evans agreed to sell the same property for £110,000 to one Francis Pavy, who purchased as a trustee for a then intended company. There were five directors named in the articles of association. Two were away from England when the company was formed, and took no part in the management till after the purchase was completed. Another

(1) 1 Ch. D. 182.
(2) 1 Dr. & Sm. 363.
(3) L. R. 2 H. L. 99.
(4) 5 Ch. D. 73; 3 App. Cas. 1218.

was Evans, the trustee who purchased on behalf of the syndicate. A fourth, by arrangement made before the registration of the company, obtained his share qualification by gift or loan from Baron Erlanger, the principal member of the syndicate, who in fact, directly or indirectly, selected all the directors. The fifth was independent of the syndicate. The three directors who were in England, at a Board meeting of the 29th September, adopted the contract for purchase. The bill was by the company, against the syndicate and directors, to set aside the purchase. Of course *Gover's Case* (1) was cited. It was argued for the plaintiffs that the facts showed conclusively that Erlanger was the promoter of the company.

"It will, perhaps, be suggested" (said the plaintiff's counsel) "that the law has been changed by *Gover's Case*, and that it is necessary to show that when the first contract was entered into the company was actually in course of formation. But *Gover's Case* only decided that an application by contributories to be relieved from liability on shares could not be granted on the ground that the contract was made with a person who afterwards became a promoter of the company, though some of the *dicta* may lend colour to the argument sought to be founded on that case. Here the company was entirely the creation of Erlanger, and the inception of it must be carried back to the time of the purchase by the syndicate."

Lord Justice James says (2) :—

"In this case the Vice-Chancellor appears to have proceeded, to a great extent, upon what was supposed to have been said in *Gover's Case*. Now, I adhere entirely to what I have said in *Gover's Case*, that is to say, it is quite open to a man to buy any property, at any price he likes, with a view or in the hope of selling that property to any company that he can get to buy it . . . But that has nothing whatever, as it appears to me, to do with the question in this case, which is, whether a man who has so bought at a low price has obtained a higher price fairly and properly in accordance with the view which the Court of Equity takes of such transactions . . . A promoter is, according to my view of the case, in a fiduciary relation to the company which he promotes or causes to come into existence. If that promoter has a property which he desires to sell to the company, it is quite open to him to do so; but upon him, as upon any other person in a fiduciary position, it is incumbent to make full and fair disclosure of his interest and position with respect to that property. I can see no difference in this respect

(1) 1 Ch. D. 182. (2) 5 Ch. D. p. 118.

Q. B. Div. 1898.

COMPONENTS TUBE CO. v. NAYLOR.

between a promoter and a trustee, steward or agent. Such full and fair disclosure was not made in this case by the syndicate, which syndicate, it is admitted, were the promoters."

Palles, C.B.

Later on he says (1) :—

"Therefore it is not a technical rule at all which requires that a vendor who in any respect is in a fiduciary position should tell the exact truth, should say he is the vendor, or state the interest that he has."

The case was then brought to the House of Lords, where the judgment was affirmed. I shall have occasion hereafter, for another purpose, to refer to some portions of the opinions of the learned Lords in advising the House upon that occasion.

The last case referred to was *Arkwright* v. *Newbold* (2), which, like *Peek* v. *Gurney* (3), was a suit in the nature of an action for damages. It was there, of course, held, following *Peek* v. *Gurney* (3) that such an action could not be maintained for mere concealment, as distinct from misrepresentation ; but the distinction is clearly drawn between such a suit and a case like the present, in which the question is the right of rescission. James, L.J., says :—

"There has been on his part" [*i. e.* on the part of Fry, J., from whose decision the appeal came] "a confusion, if I may use the expression, between two different wrongs and two different remedies—between the question what *mala praxis*, on the part of vendors and persons standing in a fiduciary position to a purchaser, is sufficient to entitle the purchaser to rescind the contract, and the question what *mala praxis* is sufficient to enable him to maintain an action of deceit."

So, too, says Cotton, L.J. :—

"A considerable portion of the learned Judge's judgment does not, in my opinion, draw a sufficient distinction between an action of deceit and an action or proceeding to set aside a purchase, or to make the directors of a company answerable for money which they received by reason of their being in a fiduciary position. An action of deceit is a common law action . . . in which it is necessary to prove that a statement has been made which, to the knowledge of the person making it, was false, or which was made by him with such recklessness as to make him liable just as if he knew it to be false ; and that

(1) 5 Ch. D. p. 120. (2) 17 Ch. D. 301. (3) L. R. 6 H. L. 377.

the plaintiff acted on that statement to his prejudice or damage. Much has been said about omission. Of course I adopt what was said by Lord Cairns, that the omission of something in a prospectus or any other document may make the statement contained in it false; as, for instance, if it contained the statement of a covenant, and omitted to state the fact that the covenant had been released; but mere omission, *even though such as* would give reason for setting aside the contract, is not, in my opinion, if it does not make the substantive statements false, a sufficient ground for maintaining an action of *deceit*."

This is the true distinction; and the decision in no wise supports the principle laid down in Lindley on Company Law.

These are the only cases there cited; and, having discussed them all, at the painful length to which I have, I think I am warranted in saying that none of the cases, either those mentioned by our own Master of the Rolls in *Aaron's Reefs* v. *Twiss* (1), or those referred to in Lord Justice Lindley's book on Company Law, or *Gover's Case* (2) as explained in *The New Sombrero Phosphate Company* v. *Erlanger* (3), establish the proposition for which they are cited.

In my opinion, the result of all these cases is :—

1. That where the circumstances are such that there can be rescission, and *restitutio in integrum*, the rule as to disclosure is that laid down in *The New Brunswick and Canada Railway Company* v. *Muggeridge* (4), and *The Central Railway Company of Venezuela* v. *Kisch* (5); but—

2. That, where the question is not the right of rescission, but is the right to damages for deceit, evidence must be given of active fraudulent misrepresentation, and that mere concealment, although fraudulent, is not sufficient; but—

3. That this second rule, as applicable to an action for deceit, is subject to this explanation, that omissions may, upon the construction of the entire document, render false a statement which would have been true had the omitted statement been contained in the document; and that, where the omission is of this character, the deceived party has a right not only to rescind the contract,

(1) [1895] 2 Ir. R. 207.
(2) 1 Ch. D. 182.
(3) 5 Ch. D. 73; 3 App. Cas. 1218.
(4) 1 Dr. & Sm. 363.
(5) L. R. 2 H. L. 99.

Q. B. Div. 1898.

COMPONENTS TUBE CO. v. NAYLOR.

Palles, C.B.

which he would have been entitled to do even had the representation not been of this character, but in addition he can treat it as active misrepresentation, as distinguished from mere concealment, and therefore make it the ground of an action for damages for deceit—an action which mere concealment would not be sufficient to maintain.

My object in thus travelling through this long line of cases is not to establish a mere abstract proposition of law, but because the true principle, when once ascertained, is conclusive upon the case before us, and renders it unnecessary for us to critically examine small matters which are found upon the fringe of the gigantic fraud perpetrated here. It goes to the root of that which every commercial man, reading the prospectus, must know and recognise as the real fraud. It is not that a syndicate of promoters, having it in their power to acquire an undertaking for £50,000, by themselves and their creatures invite the public to become shareholders in a company formed by them to purchase the undertaking, at a profit to the promoters of £60,000. That might have been done, possibly, in such a way as to be consistent with honesty, morality, and law. But the real fraud is that their invitation to the public suppresses the two material facts: 1, that the real vendors are the promoters themselves; and 2, that their sale to the company is part of one entire transaction, by the other part of which they acquire the undertaking at £60,000 less than the price at which they offer it to the public. A contract obtained by such suppression we cannot uphold without violating the most elementary principles of the common law and of justice.

I must, however, proceed a little further; because, although what I have already said is, to my mind, sufficient, and more than sufficient, for the decision of the case, and is the true basis upon which it ought to be determined, and upon which, as my first ground, I do determine it, I am unwilling to subject the defendant to the obligation of sustaining, in our Court of Appeal here, a judgment based on principles which have been disaffirmed by two eminent members of that tribunal.

I therefore proceed to discuss the case upon the assumption that the law is as it has been laid down by the late Lord Chancellor and the Master of the Rolls here. In this view I cannot avail myself of any concealment, because *ex hypothesi*, concealment, to be sufficient,

must be such as to make some material statement in the prospectus untrue, that is, must amount to active misrepresentation. I therefore treat the question as one of such active misrepresentation—as if the same question were involved here as would have arisen were the present suit, that which it is not, an action against the promoters or directors for deceit.

Treating this as the question, it is right to place in the forefront of its consideration the caution with which Courts of Equity have always applied the rule of *caveat emptor*, in relation to the only subject-matters to which they held it applicable, viz. sales between parties who stood at arm's length from one another. In reference to such a case, Lord Eldon says, in *Turner* v. *Harvey* (1) :—

"A very little is sufficient to affect the application of that principle. If a word, if a single word be dropped which tends to mislead the vendor, that principle will not be allowed to operate."

So, too, in *Walters* v. *Morgan* (2), Lord Campbell lays down:—

"There being no fiduciary relation between vendor and purchaser in the negotiation, the purchaser is not bound to disclose any fact exclusively within his knowledge which might reasonably be expected to influence the price of the subject to be sold. Simple reticence does not amount to legal fraud, however it may be viewed by moralists. But a single word, or (I may add) a nod or a wink, or a shake of the head, or a smile from the purchaser intended to induce the vendor to believe the existence of a non-existing fact, which might influence the price of the subject to be sold, would be sufficient ground for a Court of Equity to refuse a decree for a specific performance of the agreement."

To this may be added the words of Lord Halsbury in *Aaron's Reefs* v. *Twiss* (3) :—

"I do not care by what means it is conveyed—by what trick or device, or ambiguous language; all those are expedients by which fraudulent people seem to think they can escape from the real substance of the transaction."

The fifth question left to the jury was :—"Was the prospectus as a whole substantially misleading and calculated to deceive?" It is found in the affirmative; and I prefer, in the first instance, to discuss the case upon that basis, rather than to enter upon partial

(1) Jacob, 169. (2) 3 De G. F. & J. 718, p. 723.
(3) [1896] A. C. 273, p. 281.

Q. B. Div. 1898.

COMPONENTS TUBE CO. v. NAYLOR.

Palles, C.B.

and subsidiary considerations. I prefer the broad question to the excrescences which lie upon its fringe.

What, then, is the real substance of this prospectus? It represents that, amongst the business which was then carried on by the Cycle Components Manufacturing Company, was that which is styled "the tube manufacturing business"; that the manufacture of weldless tubing had become such an important feature of businesses, other than the cycle industry, that "it is desirable that a separate company should be formed to work and extend this important and long-established business." This desirability is represented as the genesis of the idea of forming the company. It then proceeds to represent that a contract has been entered into, on behalf of the company, with one William Henry Weekes, to purchase the business as a going concern, for £130,000; and it states that the company had been formed with a capital of £150,000 to adopt and carry out Piercy's contract with Weekes, the remaining £20,000—the difference between the capital and the purchase-money—being reserved as working capital.

I cannot present any doubt to my mind that these statements include a representation that the contract with Piercy had been honestly made, by persons *bonâ fide* acting on the part of the intended company, to purchase the business for £130,000; that there was a *bonâ fide* purchaser, and a *bonâ fide* vendor; that there was a *bonâ fide* agreement between two different and independent persons, an agreement which the directors of the company, when appointed, might honestly adopt as the agreement of the company, and that the agreement so to be adopted was for the purchase at £130,000 as and for purchase-money.

These were the representations. Let us now contrast these representations with the actual facts.

On the 1st October previously, the Cycle Components Manufacturing Company had agreed to lease to Mr. Hooley the business in question for £40,000, for five years at £350 a-year, with the right of renewal at Hooley's option for a further period of five years at the same rent. If the sale were not completed by the 15th December, the vendors were to have the right of cancelling the agreement, by giving a certain notice. In the following November, Mr. Hooley and Dr. Mac Cabe met; and there is

evidence that, from this period, Mac Cabe acted as if he knew that he could acquire the property from Hooley for £50,000. He appears, shortly afterwards, to have conceived the idea of purchasing it, in the event of his being able successfully to float a company to buy it from him at an advance; and thenceforward the one governing motive which operated upon the minds of Mac Cabe and those acting with him, in reference to the acquisition of the property, was that they might form a company to take the property off their hands at a profit. The idea that it was desirable to form a company "because the manufacture of weldless tubing had become an important feature of businesses other than the cycle industry," does not, upon the evidence, appear to have occurred to the minds of any of them. It certainly was not their governing motive.

Accordingly, Mac Cabe proceeded to take steps to promote such a company; and he did this before he had agreed, even verbally, with Hooley for the purchase; so that, according to the *New Sombrero Phosphate Company* v. *Erlanger* (1), he was, during the entire of the period which we have to review, stamped with the character of a promoter. One of his first steps appears to have been to take a Mr. Bulger, a Dublin stockbroker, into partnership with him in the matter of the purchase of the business and the promotion of the company.

In December, Mac Cabe asked Mr. Harvey Du Cros, junior, to become a director of the intended company. To this Du Cros, after several interviews, consented, upon five conditions, which I shall state in his own words:—

"The first was that the new company be handed £20,000, to extend the existing plant; the second was that we would be handed £20,000 in cash, for working capital; the third was that the capital should not exceed £150,000; the fourth was that Mr. Charles Sangster should be asked to take a seat on the board; and the last condition was that I should take an active interest in the company, direct the expenditure of the additional money, and that the control of the company should be carried on by a board of directors, of which I should be a member, and all the other directors should be approved of by myself. In consideration of this I was to receive £10,000 in cash, and at all times I was to place the benefit of my experience at the disposal of the company."

(1) 5 Ch. D. 73; 3 App. Cas. 1218.

Q. B. Div. 1898.

COMPONENTS TUBE CO. v. NAYLOR.

Palles, C.B.

These terms were agreed to by Mac Cabe, acting for himself and Bulger. It is impossible to regard Du Cros, while insisting on these terms, as *bonâ fide* acting for the intended company. He was acting for himself alone, securing for himself, out of that which I cannot help viewing as the plunder to be obtained from the public, such a sum as £10,000.

In consequence of Du Cros' stipulations, Sangster was applied to to become a director, and agreed to become one. His character, as a *bonâ fide* director of the company, appears from the fact that, having subsequently applied for and been allotted 500 shares, he paid up in respect of them no more than the application money, £62 10*s.*, and that the balance, £437 10*s.*, was paid for him by Bulger on the 1st March. His view of the independent position which a director ought to occupy is illustrated by his answers to a few questions (1):—

"He (Bulger) did it because I asked him. When did Mr. Bulger pay the balance on the 500 shares for you?—When the balance of the money became due. You asked him as a present?—It is the usual thing. Mr. Justice Gibson: Is this the usual thing in all cases, or only in cycle cases?—It is usual in all businesses."

At a subsequent period (the exact date is not precisely fixed nor is it material), but not later than the 13th January, 1897, Cuthbert and Wootton joined the syndicate of promoters, and three other gentlemen, of whom Mr. De Beck and Mr. Tuke were two, agreed to become directors. It is proved by Mr. Bulger that, although he made no money payment to De Beck, he gave him a transfer of 500 shares about September, 1897. He is asked (2), "Were they paid for by him?" (that is, by De Beck), and he replies, "No; they were paid for by me. I had the shares of my own when he asked for his qualification in September or thereabouts, when I was in Birmingham. It was the first [time] I knew that he wanted the 500 shares." "Did you, Dr. Mac Cabe, Mr. Wootton, and Mr. Cuthbert, each of you give £125 to Mr. De Beck?—No, we gave nothing to Mr. De Beck. Each of the four gentlemen here were debited with 125 shares. I debited the four promoters with £125 each." Mr. Justice Gibson asks.

(1) Q. 1801. (2) Q. 2809.

"In whose favour?" Mr. Bulger replies, "My own favour for 500 shares which I transferred from my own name to Mr. De Beck." "When were they first debited (*i.e.*, with the several sums of £125)?—Between the 6th May and July 24th." (1)

Mr. Bulger further proved that Mr. Tuke's position was exactly the same as that of Sangster. He got 500 shares, and the calls upon them were paid about the 2nd April (2).

We have now before us the principal *dramatis personae*: five promoters, Mac Cabe, Bulger, Cuthbert, Wootton, and Du Cros: and six intended directors, of whom two, Mac Cabe and Du Cros, were promoters; and, of the other four, there is evidence that three, Sangster, De Beck, and Tuke, were the creatures and tools of the promoters. The sixth, Mr. Mecredy, was examined as a witness. He stated that he had several interviews with Mac Cabe in Dublin, and consented to become a director, that he examined the prospectus of the company, and went through it with Dr. Mac Cabe, and that, up to the time of the trial, he believed that every statement in the prospectus was true.

The next step in the proceedings is that Bulger calls upon Mr. Purchase, the solicitor of the Cycle Components Manufacturing Company, Hooley's vendors. Now, up to this time, there is no evidence of any contract, or negotiation for a contract, between the promoters on the one hand, and the intendend directors, other than the promoters, upon the other. Bulger brings to Mr. Purchase a rough draft of the prospectus. At first, Mr. Purchase had some scruples as to acting for the promoters, but these appear to have been ultimately surmounted; and, accordingly, Purchase undertakes the legal formalities of bringing into existence, for a fee of £1500, over and above expenses out of pocket, a company to carry out the intention of the promoters.

I attach a good deal of importance to the draft prospectus, as it appears in its earlier stages. The earliest proof in evidence is Proof "B." It appears from it that, at the time it was printed, the amount of the capital of the company, £150,000, and that of the purchase-money, £130,000, were fixed; and that the

(1) Questions 2813-2823. (2) Questions 2851-2854.

Q. B. Div. 1898.

COMPONENTS TUBE CO. v. NAYLOR.

Palles, C.B.

difference, £20,000, between the capital and the purchase-money, was to be reserved as working capital. It does not contain the term which Du Cros says he had previously stipulated for, viz., that £20,000, part of the purchase-money, should be expended upon extension of the plant. The figures at which the capital of £150,000, and the purchase-money at £130,000, were stated in this prospectus, were the maximum sums at which they could respectivsly have been fixed, consistently with the arrangement beween Mac Cabe and Du Cros.

Thus, at this time, the terms upon which the business was to be sold to the company were substantially fixed; and the evidence is a total blank as to any previous negotiation, between the promoters, and such of the directors as were not promoters, as to those terms.

This draft prospectus states that the premises, plant, and machinery, together with the contracts for the new machinery, were valued at a sum which is left in blank; that the stock-in-trade, tools, and book debts were guaranteed by the vendors to exceed a sum which is also left in blank. Ultimately these statements were struck out of the prospectus. There was no valuation of the lands, of the plant, or of the machinery; no guarantee as to the value of the stock-in-trade; no inquiry as to the profits of this branch of the business; plainly no consideration given as to the real value of the property, which *ex hypothesi* did not exceed £50,000—the sum to be paid by Hooley, if, indeed, it was worth that sum. There is no evidence how the purchase-money came to be fixed at £130,000. It was competent to the jury to draw the inference that there was no negotiation whatever on the subject with Sangster, Mecredy, DeBeck, Tuke, or any other persons on behalf of the company; that they consented to act as directors upon the basis of the terms of a so-called contract having been arranged, but that they took no part in relation to those terms, save so far as Du Cros made stipulations on his own behalf at the first interview. The jury might also reasonably have inferred that the amount of the purchase-money, £130,000 was fixed by the promoters only, and was so fixed solely because, consistently with Du Cros' terms, they could not fix a higher one.

It was further competent to the jury to infer that, so far from

there being a contract between the promoters on the one hand, and the other intending directors upon the other, there was, up to this period, no contract whatsoever. A man cannot contract with himself; nor can a syndicate consisting of Mac Cabe, Du Cros, and others, contract with the same Mac Cabe, Du Cros, and others. There was nothing unreasonable in the jury viewing the transaction in the same light as did Sir George Jessel, M.R., a similar one in the case already referred to, the facts of which bear a strong resemblance to those before us:—

"It is nothing more" (says Sir George Jessel (1)) "than a mere sham contract, a thing entered into by one agent of the promoter to sell, with another agent of the promoter to buy; there really was nothing more in it when it had been adopted than when it was entered into; and it was not a transaction which could in any sense bind the company."

Neither would there have been anything unreasonable in the jury taking the same views of the directors, and of the promoters, as did the same learned Judge.

"Therefore we have" (he says (2)), "a selection of five directors, two of whom were abroad, one is the actual agent for the promoter for conducting the sale, another is the mere puppet of the promoter, and the last is the Lord Mayor of London, who was not likely to take an active part in investigating the preliminary history of the contract which he is asked to confirm. That may, or may not, be called 'craft and subtle device,' that is mere matter of opinion, but I think the mode of nominating the directors was, at least, singularly well adapted to obtain a body which would sanction this contract. . . . Now (3), this prospectus was issued, in my view of the case, by the promoters. It was actually prepared by them, and was brought ready printed to the meeting. It was nominally adopted by the directors; but, as I said before, I look upon two out of three directors as merely agents for the promoters, and their adoption would not make it more or less the act of the promoters. It was, in fact, the prospectus of the promoters. It does not state who the real vendors are, and it does not state what the price they gave for it was. Now, understanding, as I do, that the promoters of a company stand in a fiduciary relation to that company which is their creature; in this case that is emphatically so . . . Persons in a fiduciary position must make a full and fair disclosure when they are about to sell property to those towards whom they stand in that relation. Is it a fair thing to omit stating that they themselves are the owners of the property? That, I think, is obviously not fair. Is it a fair thing to omit to state

(1) 5 Ch. D. p. 113. (2) 5 Ch. D. p. 109. (3) 5 Ch. D. p. 111.

Q. B. Div. 1898.

COMPONENTS TUBE CO. v. NAYLOR.

Palles, C.B.

that they have themselves purchased the property, at the valuation sanctioned by the Court of Chancery, for half the amount? I do not think it is absolutely necessary that in all cases the price given should be stated; but, looking at the peculiar position of the parties, I think it was necessary here."

These are the words of Sir George Jessel, and are as applicable here as they were to the case before him. There is no evidence of the fixing of terms, or of any agreement whatsoever. The terms in the prospectus were those of the promoters only. Upon the evidence, the other directors did little more than consent to become such, and agree to the prospectus; but these matters, taken together, will not amount to such a contract as a court of equity will hold to be binding upon a subsequently formed company.

So matters stood at Bulger's first interview with Purchase. Upon that occasion the latter promised to have the contracts prepared in skeleton, and accordingly he procured four skeleton drafts to be prepared by counsel.

By the first, Hooley agreed to sell to A. B., the subject-matter of the agreement of 1st October, 1896, for £50,000.

By the second, A. B. agreed to sell the same property to one Ernest Piercy, as trustee for the intended company, for £130,000, out of which the vendor agreed to allow £20,000 for the cost of alterations and extensions of machinery and plant, and to pay the costs of the agreements, and of the formation and floating of the company.

By draft No. 3, The Cycle Components Manufacturing Company agreed with Piercy that, in lieu of the lease mentioned in the agreement with Hooley of the 1st October, 1896, the company would grant to the new company a lease for twenty-one years, at a rent of £400 a year, with a provision for its renewal, at the option of the lessees, for a further term, and also with a provision enabling the new company to purchase the reversion on certain terms.

The fourth draft was an agreement between A. B. and Harvey Du Cros, junr., in reference to the £10,000.

The agreement of which the third of the above instruments was the draft, by which the Cycle Components Manufacturing Company agreed, in consideration of an increase in the rent of

only £50 a year, to extend the term of years for which they parted with the site, to a period which was more than double the term which Hooley had agreed to purchase from them for £40,000, throws a lurid light upon the alleged profitable character of the business to be sold.

It is unnecessary to follow the various alterations in the drafts. It is sufficient to say that ultimately the name of William Henry Weekes, a clerk of Purchase, was inserted in the agreements, one, three, and four, instead of A. B.; and with that and certain other changes the agreements were subsequently executed. Three of them bear date the 27th, and the remaining one the 28th January, 1897. They form the documents numbered two to five in the prospectus.

Having now gone back behind these writings, and having ascertained the truth of the transaction, it is right to recall to mind the views which, before the Judicature Act, a Court of Equity, and since that Act any Division of the High Court, would be bound to take of such a matter, if, under the circumstances, the transaction really amounted to a contract.

The following are the words of Lord Cairns, L.C., in the case already referred to—*Erlanger* v. *New Sombrero Phosphate Company* (1):—

"They" (*i. e.* the promoters of a company) "stand, in my opinion, undoubtedly in a fiduciary position. They have in their hands the creation and moulding of the company; they have the power of defining how and when, and in what shape, and under what supervision, it shall start into existence, and begin to act as a trading corporation. If they are doing all this in order that the company may, as soon as it starts into life, become, through its managing directors, the purchasers of the property themselves, it is, in my opinion, incumbent upon the promoters to take care that in forming the company they provide it with an executive, that is to say, with a board of directors, who shall both be aware that the property which they are asked to buy is the property of the promoters, and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made. I do not say that the owner of property may not promote and form a joint stock company, and then sell his property to it, but I do say that if he does he is

(1) 3 App. Cas. p. 1236.

Q. B. Div. 1898.

COMPONENTS TUBE CO. v. NAYLOR.

Palles, C.B.

bound to take care that he sells it to the company through the medium of a board of directors who can and do exercise an independent and intelligent judgment on the transaction."

Unquestionably, the proof of the affirmative of these propositions lies upon him who attempts to support the transaction; and so far from there being evidence that the directors here were "competent and impartial judges as to whether the purchase ought or ought not to be made," or that they "could or did exercise an independent and intelligent judgment on the transaction," the inferences to be drawn from the facts proved are entirely the other way. I have further to observe that the only meeting at which the agreement was before the directors, and that at which it was adopted, was that of the 18th February, at which there were present only four directors, viz., Mac Cabe and Du Cros, two of the promoters, and Sangster and Tuke, whose position I have already described.

It may be said that the present case is distinguishable from *Erlanger* v. *New Sombrero Phosphate Company* (1), because the present case is not one between the promoters and the company. No doubt this distinction exists, but in my opinion it is not material; and I arrive at that conclusion for the following reasons. By accepting the allotment of shares, the defendant here agreed that £130,000, upwards of four-fifths of the capital, should be applied in a payment under an alleged contract, which is called a purchase, but which in fact was an unreality and a fraud, which was not binding upon the company. When the case I have referred to was before the Court of Appeal (2), both Sir George Jessel, M.R., and James, L.J., considered it as well in reference to the rights of individual shareholders, as of the company in its corporate capacity. It was necessary to do so, because it was urged in the argument that as there may have been many shareholders of the company who were parties to the fraud, the company itself was not the proper plaintiff, and that it was impossible to do equity between the defendants and the different shareholders, unless every shareholder filed his own bill or brought

(1) 3 App. Cas. 1218. (2) 5 Ch. D. 73.

his own action against the parties who misled him. Sir George Jessel shows how the representations to the shareholders could be relied upon there, although the action was one by the company. He says (1):—

"How does the representation made by the prospectus to the shareholders become material? It is a question of substance. These gentlemen who were nominated as directors had a duty to perform, not to the then nominal shareholders, who are nobodies—there were really none, although there were persons who had agreed to take shares—but to the future shareholders, who were to form the real company."

James, L.J., says (2):—

"The ordinary remedy of a shareholder, in a case of this kind, would be to say: 'You, the company, through and by your directors, led us into the thing,—we want to rescind the contract by which we became shareholders.' The remedy of the shareholder is to be relieved of his character of shareholder, and the company alone has the right to deal with the contract to which the company as a company is a party."

These passages seem to be express authorities that such a misrepresentation as that the alleged contract of purchase here was a *bonâ fide* contract, is a sufficient ground for rescission.

I am of opinion that it was competent to the jury, upon the evidence, to find that there was a misrepresentation as to the motive for floating the company; and that, in relation to the contract to purchase, there were at least four distinct misrepresentations. They might have held—

1. That there was a misrepresentation, because, in truth and fact, there was no contract at all.

2. Because, if there were the *factum* of a contract, it was not an honest or binding one, or one which the directors, acting for the company, could honestly adopt.

3. Because, even if honest and binding, it was a contract not with Weekes, but with the promoters.

4. Because it was not a contract for purchase at £130,000, but a contract in which the real purchase-money was fraudulently swollen, by an addition to it of £60,000, either as plunder or as commission.

(1) 5 Ch. D. p. 113. (2) 5 Ch. D. p. 122.

Q. B. Div. 1898. COMPONENTS TUBE CO. v. NAYLOR. Palles, C.B.

Pausing here, I have to state that I am not only of opinion that, for the reasons I have already stated, there was ample evidence to go to the jury, but that, having regard to the findings of the jury, in answer to question 6 (*b*), that the defendant was induced, by the statements and omissions referred to, to apply for and take the allotment of shares, and that he had repudiated within a reasonable time after discovery, I would hold that, had the verdict been directed for the defendant upon those two findings alone, I would have been prepared to uphold it. Undoubtedly I should have refused to allow any verdict to stand which negatived material misrepresentation or material suppression. The case is one in which *res ipsa loquitur*.

As to the argument that the defendant here must be deemed to have had notice of the true character and particulars of the documents referred to in the prospectus, I designate it by the one word by which a similar argument was disposed of in the House of Lords in *Aaron's Reefs* v. *Twiss* (1), by the word "audacious."

The view I have taken of the real substance of the transaction so entirely sustains the verdict, that it would be a waste of public time were I to travel in detail into the many matters which the course of the trial coerced the learned Judge to refer to, in the course of his most patient summing up. I shall therefore say no more than that I entertain no doubt that there was ample evidence to go to the jury—

1. That the orders procured in January for tubes were not *bonâ fide* trade orders.

2. That the representation that the Cycle Components Manufacturing Company had undertaken to take the balance of the plaintiffs' output for the then current season was false to the knowledge of the directors.

3. That the statement, that "the vendor stipulates that he may subscribe for and require the directors to allot to him at least a third of the capital," was untrue in fact, and was inserted for the purpose of deceit.

4. That the omission of the term in the contract with Piercy which made the length of the renewal term in the lease dependent

(1) [1896] A. C. 253.

on the discretion of the lessors was material and calculated to mislead.

The second question is as to the admissibility of particular portions of the evidence received, the rejection of one matter tendered in evidence, and certain passages in the summing up of the learned Judge, as distinguished from its general frame and scope.

As to this, although the speech of Du Cros, senior, was admissible in evidence as going to the credit of witnesses who, being present when it was made, gave evidence at the trial which was inconsistent with the facts stated in it, I am unable to hold that it was evidence, as against the company, upon the truth of the representation that the business was a profitable and extending one; and, as I read the summing up, the speech was submitted to the jury as some evidence upon this matter.

The entry in Bulger's books, and the statement in his letter, as to the purpose for which certain sums were paid to some of the directors, were admissible, to contradict his (Bulger's) statement to the contrary; but I am unable to hold that they were evidence against the plaintiffs as to the purpose for which those sums were in fact paid; and, as I read the summing up, this entry and letter were left to the jury as evidence as to this purpose.

I am of opinion, that there were no other portions of the evidence which were wrongly received, or the effect of which was erroneously dealt with by the learned Judge in his summing up.

Coming now to the question of the rejection of evidence, I am of opinion that, as there was evidence that, in framing the prospectus, the promoters acted upon the advice of Purchase, and as the charge of moral fraud made against those promoters was a relevant matter in the case, the "opinion" of counsel, which (it is suggested) directed that the agreement should be made with a nominal party instead of with the promoters *nominatim*, was admissible in evidence. In my opinion, no other admissible evidence was rejected.

I am, however, satisfied that the use which was made by the learned Judge of the two first matters of evidence, and the rejection of that "opinion" of counsel, ought not, and did not, to the slightest extent, affect the verdict. I hold, accordingly, that they did not

Q. B. Div. 1898.

COMPONENTS TUBE CO. v. NAYLOR.

Palles, C.B.

cause any substantial wrong or miscarriage, within the meaning of Order XXXIX., Rule 7, basing my opinion upon the overwhelming nature of the case made for the defendant.

The remaining ground relied on by the plaintiffs is that the case was wholly mistried, that the learned Judge illegally received a mass of evidence which was calculated to prejudice the minds of the jury, and that in his charge he submitted to the jury topics which were irrelevant and likely to mislead them.

My opinion upon this question can be stated in a very few words. Admitting, as I have in the commencement of my judgment, that the frauds of the promoters and directors cannot be imputed to the company, the company cannot retain benefits which were procured through the fraud of its authorised agents. Secondly, even assuming that, as Mac Cabe and Du Cros were not directors until after the allotment, they were not authorised agents of the company at the time of the issue of the prospectus and the payment by the defendant of his deposit, I hold that the company cannot retain benefits which have been obtained by the misrepresentation of persons purporting, although without authority, to act on their part; and further that, as the directors, and Mac Cabe and Du Cros, were acting together for a common purpose, the floating of the company, their acts are admissible to show the object and intention of the directors, who were acting with them towards the common purpose. I further hold that—although proof of actual fraud was not essential, inasmuch as the law would presume that the directors and promoters actually intended that which would be the natural result of their acts—still the defendant was at liberty to add to this necessary proof the further proof of actual moral delinquency, as fraud either actual or presumed is essential to entitle him to avoid his contract. I further hold that the later acts of the directors and promoters, such acts not being mere admissions, were admissible to show the character of their acts and conduct in relation to the issue of the prospectus.

I have read the entire of the summing up of the learned Judge—a summing up which, I venture to say, was a most luminous one, and characterised by his usual legal *acumen* and accuracy. I am of opinion that, with the exception of the two

slight matters I have referred to, no portion of the evidence was improperly dealt with, or referred to in a mode calculated to unduly prejudice the plaintiffs with the jury. All his comments upon the circumstances proved appear to me to be well within the province of the Judge, upon the trial of such a case as the present.

In my opinion, the verdict should stand.

MADDEN, J.:—

There is one part of every prospectus the materiality of which is beyond question. It sounds like a truism to say that the public, when invited to subscribe to an undertaking, are entitled to be clearly and truthfully informed of the purpose to which their money is intended to be applied. And yet this self-evident proposition is, in my view of this case, the only one of a general character which it is necessary to enunciate. The prospectus, in its opening statement, promises to fulfil one of these conditions. The first paragraph does define clearly the purpose for which the company was formed. It was to acquire, carry on, and develop, a certain business, described as the tube manufacturing business carried on by the Cycle Components Manufacturing Company, Limited, at Bournbrook, Birmingham.

I pass by, for the present, the description of this business as "well-known profitable, and extending"; and the various statements, in succeeding paragraphs, by which this general description of the business is supplemented, noticing only the paragraph which states that "the business will be taken over as a going concern as from the 1st September, 1896, and all profits accruing from that date will belong to the company." Profitable or unprofitable, well-known or obscure, extending or declining, the business carried on by the Cycle Components Manufacturing Company was to be acquired by the company as a going concern as from a certain date; and the money subscribed by the public was to be devoted to its acquisition, working, and development.

This formation of a joint stock company for the purpose of purchasing and developing an existing business is one of the commonest of financial operations; and the essential features

Q. B. Div. 1898.

COMPONENTS TUBE CO. v. NAYLOR.

Madden, J.

of a transaction of the kind are well-known, not only to lawyers, but to all members of the investing public. A certain portion of the capital of the new company represents the purchase money of the business, presumably (for the directors must be assumed to be intelligent and honest) its selling value. The remainder is reserved for working capital, or otherwise applied in the development of the concern. This is the idea conveyed by the first paragraph of the prospectus; and, reading it through, I can find no representation of a transaction of a different nature. The capital of the company is fixed at £150,000. Of this, £20,000 is reserved for working capital, and the purchase price is represented as having been fixed at £130,000. But, of this sum, £20,000 represents "contracts for the alteration and extension of the machinery and plant," which are stated to have been entered into "since the sale of this branch of the business of the Cycle Components Manufacturing Company," leaving £110,000 to represent the purchase-money, properly so called.

Now, what is the impression that would be conveyed to an ordinary mind by these representations? No particular form of words (as Lord Halsbury, C., said in *Aaron's Reefs* v. *Twiss* (1)) is necessary to convey a false impression. The prospectus never states in express terms that the business is to be purchased from the Components Manufacturing Company. The language, in some respects, is what Lord Halsbury describes as "ambidextrous." I agree with Mr. Ronan that a careful examination of the prospectus might show that this sum of £130,000 was not to be paid directly to the Cycle Components Manufacturing Company, but to some individual referred to as the vendor, who is represented as having entered into contracts and given guarantees in connexion with the promotion of the company. This individual is not named, nor is there indication of his interest in the transaction. Counsel for the plaintiffs are not agreed as to his identity. According to Mr. Ronan "the vendor" is Weekes, and those behind him; in other words, the syndicate. According to Mr. Bushe, he is Weekes, pure and simple. But, whoever he may be, it would not be consistent with the representations in the prospectus to infer

(1) [1896] A. C. p. 253.

that this vendor was a purchaser from the Components Company, who had acquired the business as a going concern under one of the specified contracts, and who was reselling to the new company; for the earliest of these contracts is dated the 1st October, 1896, and the business is to be taken over as a going concern as from the 1st day of the preceding month. The references in the prospectus to this mysterious vendor would differently affect different minds. A cautious and experienced London speculator, observing that the specified contracts might be seen at the office of the London solicitor of the company, might examine them, with the result that will presently appear. But a prospectus is not to be regarded from the point of view of a London stockbroker, and we must consider its effect as addressed to an ordinary member of the public, who is entitled to deal with it as an honest document, fairly setting forth the nature of the undertaking in which he is invited to embark. Whatever obscurity there may be about the manner in which the transaction is to be carried into effect, or about the position and functions of the "vendor," there is none about the object for which the company was formed. It is the acquisition, presumably at a fair price, of a business carried on as a going concern by the Components Company, and taken over from their hands as a going concern by the new company, as from a date anterior to any of the contracts specified in the prospectus.

Such is the representation. What are the facts? In order to ascertain them it is not necessary to travel outside the documents specifically referred to in the prospectus, that is to say, the contracts set forth by dates and names of parties in obedience to the 38th section of the Companies Act of 1867.

The particulars of the contracts relating to the several sales of the business for £40,000, £50,000, and £130,000 have already been stated, and I need not refer to them in detail. It appears from these contracts that between the day from which the business was to be taken over by the new company (the 1st September, 1896), and the date of the prospectus (the 30th January, 1897), it had been bought and sold no less than three times; that two of the contracts specified as having been "entered into" were not entered into in connexion with the acquisition of the business by

Q. B. Div. 1898.

COMPONENTS TUBE CO. v. NAYLOR.

Madden, J.

the company, but represented two distinct anterior dealings; that the price received by the Components Company for the business was the sum of £40,000; that the sum of £130,000 was not "the purchase price" of the business in any real sense of the word, but money paid to one William Henry Weekes, who appears to have bought it for the sum of £50,000, and to have retained it for the space of one day, although he is represented by the prospectus as taking a keen interest and an active part in the development of the concern, in language which, in view of the proved facts of the case, and as applied to a man in the position of Weekes, is deserving of attention as an example of elaborate irony.

A great deal of light is thrown upon these transactions by the oral evidence. But I should not have thought it necessary to examine the evidence in detail even if it had not been dealt with so fully in the judgment of the Lord Chief Baron, for, apart altogether from this evidence, I entertain no doubt that a shareholder who had subscribed on the faith of the prospectus, and who was unaware of the dealings disclosed by the specified contracts, could have successfully repudiated liability on the evidence supplied by the contracts themselves.

It would, of course, be different if the shareholders were affected with notice of these contracts, by reason of the reference to them in the prospectus. The doctrine of constructive notice is responsible for much, but it has not been sanctioned as an engine of fraud. In its origin it was intended as a protection against fraud—the fraud of a man who, having been afforded means of acquainting himself with a document, and having presumably availed him of the means so afforded, affects ignorance of its contents. It can be fairly applied in cases like the investigation of title, where documents referred to are usually examined, and where it is generally understood that this precaution is omitted at the risk of the person who could avail himself of it. I need hardly say that no such practice and no such understanding could possibly exist with regard to documents referred to in a prospectus, which are practically inaccessible to the great body of intending investors. To allow directors, who had conveyed a false impression in the body of the prospectus, to say to a shareholder, "we

gave you notice of certain documents, the perusal of which would have opened your eyes; true, they could only be seen in London, and you reside in Limerick, but a Court of Justice will hold on equitable principles that you knew all that was in them," would be a strange application of the equitable doctrine of constructive notice. In the words of Lord Watson in *Aaron's Reefs* v. *Twiss* (1), "when analysed, it simply means that a person who has induced another to act upon a statement made with intent to deceive must be relieved from the consequences of his deceit, if he has given his victim constructive notice of a document, the perusal of which would have exposed the fraud."

The shareholder must therefore be treated as ignorant of the facts disclosed by these contracts. If I have rightly stated the general impression conveyed by the body of the prospectus, obscure as some of its references may be, it is clear that the contracts give the lie to the impression so conveyed. The concealment of those contracts not only deprives the shareholder of material information which he was entitled to receive from the directors (which would be sufficient for the purposes of the defence to this action, as the Lord Chief Baron has so fully explained), but it goes to the full extent of falsifying the prospectus in several particulars, the materiality of which is beyond doubt. If the vendor be (to adopt Mr. Ronan's words) "Weekes and those behind him"—a phrase denoting the syndicate—it is false to represent them as the owners of a going concern, in the extension and development of which they had taken an active part. If the term "vendor" be taken to refer to the Cycle Components Manufacturing Company, it is false to represent them as fixing the price, at £110,000, of a going concern which they had already sold for £40,000. And above all, looking at the reality of things, the *bonâ fide* acquisition of a manufacturing industry, at a fair price, is a transaction essentially different from the operation of putting into the pockets of speculators the sum of £110,000, of which considerably less than one-half represents the purchase-money of the going concern. If a jury in the face of the documentary evidence furnished by the contracts could be found to affirm the

(1) [1896] A. C. p. 287.

Q. B. Div. 1898.

COMPONENTS TUBE CO. v. NAYLOR.

Madden, J.

substantial truthfulness of the prospectus, I do not believe that their verdict could be allowed to stand.

The defence in the present case raises the same questions as are involved in an action by a shareholder to rescind his contract on the ground of misrepresentation. It is not a proceeding against directors for the purpose of making them personally liable for the consequences of their misrepresentations—that is to say, an action of deceit. The essence of the former action is misrepresentation, of the latter, fraud. The nature and extent of the obligation which rests on persons who issue a prospectus to the public, and invite them to take shares in a proposed undertaking on the faith of the representations therein contained, were, at an early period in the development of company law, expressed by Kindersley, V.-C., in a short passage, described as "a golden legacy" by Lord Hatherley (when Wood, V.-C.) in *Henderson* v. *Lacon* (1), and adopted as the foundation of their judgment by the House of Lords in the *Central Railway Company of Venezuela* v. *Kisch* (2), and afterwards in *Aaron's Reefs* v. *Twiss* (3). They are "bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge, the existence of which might in any degree affect the nature, or extent, or quality of the privileges and advantages which the prospectus holds out as inducements to take shares": *New Brunswick and Canada Railway Company* v. *Muggeridge* (4). This passage conveys to my mind a statement of the obligation which is cast upon a vendor who induces a member of the public to become a purchaser of any property on the faith of a prospectus. Whenever a vendor—and the directors occupy the position of a vendor—undertakes to inform a purchaser as to the circumstances of the subject-matter of the contract—and this is the function of a prospectus—the purchaser is not left to take care of himself, and the maxim *caveat emptor* is inapplicable. On the question of the extent of the obligation cast upon directors who issue a prospectus to the public, I find myself in absolute accord with the Lord Chief Baron. This being so,

(1) L. R. 5 Eq. p. 262.
(2) L. R. 2 H. L. 99.
(3) [1896] A. C. 253.
(4) 1 Dr. & Sm. 363, 381.

the foundation of that obligation is not a question of practical importance for the decision of this case. For myself, I may say that I do not regard the obligation as resting upon any fiduciary relationship, such as exists between the promoters of a company and the company purchasing from them, and is fully explained in *Erlanger* v. *New Sombrero Phosphate Company, Ltd.* (1). It seems to me to spring from the relation of vendor and purchaser, whenever a prospectus intervenes as the basis of the contract of purchase. The general principle governing such cases has been clearly stated in its application to contracts to take shares by Kindersley, V.-C., in the passage which I have quoted. From his language it would appear that the obligation of disclosure cast upon directors falls little, if at all, short of that created by the existence of a fiduciary relationship. Indeed it has been expressed in nearly the same language as that quoted by the Lord Chief Baron from the judgments in *Erlanger* v. *New Sombrero Phosphate Company* (1), which was a case of fiduciary relationship. The application to the facts of the present case of the golden rule thus laid down seems to me to be so clear as to render unnecessary a detailed examination of the questions which have arisen in other cases, as to the materiality of certain classes of information, or as to the language which is allowable in framing a prospectus. For no reasonable man can doubt that the judgment and action of intending shareholders would have been affected, if they had been told that they were asked to give £110,000 for what had been bought the day before for £50,000; and the withholding of knowledge of a fact so material is, in itself, sufficient to entitle a shareholder to rescind his contract.

If an aggrieved shareholder desires to go further than rescission, and to fix personal responsibility upon the authors of a prospectus, questions of a different character arise. He can do so only in a proceeding equivalent to the old common law action of deceit. This action, as its name imports, is founded on deception, that is, on actual fraud. Several of the cases cited on behalf of the plaintiffs were conversant with actions of this kind, and in considering their application to the present case, two circumstances

(1) 5 Ch. D. 73; 3 App. Cas. 1218.

Q. B. Div. 1898.

COMPONENTS TUBE CO. v. NAYLOR.

Madden, J.

must be borne in mind. The defendant here is not in the position of the plaintiff in an action of deceit. He is entitled to succeed on proof of material misrepresentation, however innocent, in the sense in which misrepresentation is understood. The jury, it is true, have gone further, and have found that the misrepresentations complained of were fraudulent. If they had done so without evidence, this might under certain circumstances be material in considering their findings upon the other issues. But it is important to remember that proof of actual fraud is not a necessary part of the defendant's case. Inasmuch as fraud has, in the present case, been found as a fact by the jury, the question for our consideration is whether there was legal evidence before them reasonably leading to that conclusion. *Peek* v. *Derry* (1), and *Angus* v. *Clifford* (2), were cited on behalf of the plaintiffs, but in neither of those cases did the Judge who heard the case upon the evidence, find fraud, and this circumstance is pointedly referred to in the judgments of the Court of Appeal in *Angus* v. *Clifford* (2). In *Peek* v. *Derry* (1) the House of Lords (restoring the decision of Stirling, J., and reversing that of the Court of Appeal) held that an action of deceit does not lie against directors who make a statement, ethically true, but logically false, although there may be no reasonable grounds for their belief; and this principle was applied by the Court of Appeal in *Angus* v. *Clifford* (2), where directors were found guilty of carelessness, but not of dishonesty or disregard of truth. These decisions define clearly that the nature of the issue, in an action of deceit, is actual fraud. Inasmuch as actual fraud was not found as a fact in either of these cases, they throw no light upon the question how far a jury would be justified in inferring a fraudulent intent from gross carelessness, or absence of reasonable ground for belief in the truth of statements in a prospectus. They would be of importance in regard to the issues of fraud if there were any doubt as to the sense in which these issues were left to the jury in the present case. But the resources of the English language fail to make it plainer than the learned Judge has made it, that the fraud of which he spoke was actual moral delinquency.

(1) 3 App. Cas. 337. (2) [1891] 2 Ch. 449.

While there may be misrepresentation and consequent rescission without fraud, it follows from the very nature of the case that the particular misrepresentation with which I have been dealing necessarily involves fraud on the part of the directors. The misrepresentation consisted in concealing certain material facts. If these facts were known to the directors, their action in concealing them was dishonest, immoral, wrong, or fraudulent, it matters not which term you use. There is no possible escape from this conclusion, if the premises be established; and it is absolutely certain that the directors, who are responsible for the prospectus, knew of the contracts.

The fraudulent concealment in the present case is not only gross and palpable, but somewhat clumsy. There is a well-known book of reference which might be usefully studied by promoters and directors of joint stock companies, desirous of practising economy in truth-telling. It contains a kind of chart for the guidance of promoters, marking certain rocks on which companies have suffered shipwreck, or (to drop metaphor) various frauds already condemned by Courts of Justice. In addition, under the head of "significant omissions and vague statements," certain questions are noted as likely to arise on the prospectus, in the case of a going concern. One of those questions is thus stated:—"Is the real proprietor selling to the company, or is there an intermediate vendor, and is he making a profit on the transaction?" (1). To have answered this question truthfully would have rendered it impossible to float the company. This circumstance may vindicate the intelligence of the directors, but, unfortunately, at the expense of their honesty.

I am, therefore, of opinion that the jury were bound upon the documentary evidence to which I have referred to find, as they have found, in answer to the 5th question, that the prospectus was "as a whole substantially misleading and calculated to deceive," and that any other finding would not have been allowed to stand. This finding would dispose of the case; but, under the circumstances, it seems necessarily to involve, and certainly to justify, a finding in answer to the 7th question, that the

(1) Palmer's Company Precedents, p. 56.

Q. B. Div. 1898.

COMPONENTS TUBE CO. v. NAYLOR.

Madden, J.

prospectus was fraudulent in the particulars in which it was misleading and calculated to deceive.

The greater part of the arguments addressed to us on behalf of the plaintiffs dealt with questions other than those to which I have hitherto addressed myself, and this for reasons which I can readily understand. Mr. Bushe argued that the whole case had been tried on a wrong basis, that it was not brought home to the jury that the burden of proof rested on the defendant, that evidence was admitted which must vitiate the finding upon any of the issues, and that the several findings of fraud were unsupported by any legal evidence.

Now, it does appear to me that at the trial a great mass of evidence has been presented to the jury in a manner which rendered it extremely difficult to distinguish between affirmative evidence and matters which only went to the credit of the plaintiffs' witnesses. I also think that the jury may have failed to realize, at all events until the Judge began his charge, that the burden of proof rested on the defendant. But it is equally clear to my mind that this was the necessary consequence of the way in which the plaintiffs elected to conduct their case. They might have followed the usual course, and simply proved, in the first instance, the contract by the defendant to become a shareholder. It would then have rested on the defendant to prove that the prospectus was misleading in some material particular. This he must have done by affirmative evidence, which would have been clearly defined, and easily distinguishable from the cross-examination of the witnesses produced by the plaintiffs at a subsequent stage of the case. The defendant could have selected some definite point of attack. For aught I know he might have contented himself with throwing down the contracts by which the dishonesty of the prospectus is conclusively proved. At all events the number of questions submitted to the jury would probably have been diminished, and the question of misrepresentation and fraud would have been approached, in the first instance, by the defendant, upon whom the burden of proof rested.

This course was not taken. Probably when one particular point in a position is indefensible, it is wise to extend as far as possible the area of operations. Mr. Ronan certainly did this when he

announced in his opening speech that he undertook to prove (I quote from the report of the learned Judge) that "everything in the prospectus was truly stated." The necessary consequence was the cross-examination at great length of all the plaintiffs' witnesses before the defendant had produced any evidence at all. I say necessary consequence, because the plaintiffs had announced their intention of making a complete case in the first instance, and I find that they did in fact examine six witnesses, none of whom, save Harvey Du Cros, junior, were afterwards recalled. It is quite true that a large part of the evidence thus elicited on cross-examination deals with matters which, if relevant at all, went only to the credit of the witnesses. It is also true that, the burden of proof resting on the defendant, no amount of evidence of this kind could supply the place of affirmative evidence in regard to the several issues. The consequence was that the Court was occupied for four days in taking evidence more or less dealing in anticipation with certain frauds which it lay upon the defendant to allege and prove, the relevance or effect of which could not be estimated in the absence of the affirmative evidence on the part of the defendant. For all this the plaintiffs are responsible. But when I turn from a consideration of the conduct of their case by the plaintiffs to the rulings and charge of the learned Judge, I find that he did his utmost to prevent any misconception in the minds of the jury. He explained to them, in the clearest language, that the onus of proof lay on the defendant throughout. No objection was taken to his charge. A great deal was said about the admission of the speech of the elder Du Cros. It appears to have been admitted by consent for what it was worth; it turned out to be worth nothing as affirmative evidence, and the Judge told the jury so. This topic might be of importance if the case rested on the findings of the jury on the questions submitted to them as to the prosperous character of the business. But it could not possibly affect a finding based on the documentary evidence supplied by the contracts, and this finding is, in my opinion, sufficient to dispose of the case.

Mr. Ronan began by stating that a vast mass of evidence had been admitted relating to frauds for which, even if proved, the company would not be responsible. He referred to alleged frauds on the

Q. B. Div. 1898.

COMPONENTS TUBE CO. v. NAYLOR.

Madden, J.

part of the promoters antecedent to the prospectus. If either party has reason to complain of the ruling of the learned Judge on this part of the case, it is certainly not the plaintiffs. "In my charge," he informs us, "I directed the jury that no fraud antecedent to the formation of the company could affect the case, and to confine their attention exclusively to the prospectus." In this statement of the law I entirely concur, in so far as it lays down that the shareholder's right to rescind rests solely on misrepresentation in the prospectus, and that he cannot rely upon any previous misrepresentation, however fraudulent, as a ground for rescission. How far the investigation of the antecedent conduct of directors responsible for a prospectus might, under certain circumstances, become material or necessary in order to ascertain the truthfulness of the prospectus, is an inquiry which does not arise in the present case. It would have arisen, as Mr. Justice Gibson pointed out in the course of the trial, in the event of the jury finding in favour of the plaintiffs. It is sufficient to say that the learned Judge appears to have adhered rigidly throughout the trial to the principle laid down by him in the passage which I have quoted.

The view which I take of this case renders it unnecessary for me to examine in detail the evidence bearing on what I may call the subsidiary questions left to the jury. If the prospectus was misleading and fraudulent in its main statement—as to the objects for which the company was formed—no amount of accuracy in matters of detail would disentitle a shareholder to rescind the contract. If indeed the finding of the jury upon the main question depended, not upon documentary evidence, but upon the credibility of witnesses, or upon other matters as to which opinions might reasonably differ, the action of the jury in regard to the subsidiary questions would become material. If the jury had found the directors guilty of fraud upon some of the issues submitted to them without legal evidence, their finding could hardly be considered satisfactory upon any issue in regard to which evidence had to be weighed, and probabilities balanced. But the peculiarity of the present case is that the prospectus is self-condemned. The documents referred to, and for this purpose incorporated in it, but of which the shareholder had no notice, demonstrate it to be not only misleading but fraudulent, and no

verdict to the contrary could be regarded as reasonable. Thus the findings of the jury upon this part of the case stand by themselves, and are to my mind unaffected by considerations which apply to the other questions in the case.

The converse, however, is not true, for the findings of the jury upon the subsidiary questions must necessarily be affected, and rightly affected, by their opinion of the honesty or dishonesty of the prospectus in its cardinal representation. It is urged against the findings of the jury that they found each mis-statement, however unimportant comparatively, to have been fraudulently made. The facts, as regards each statement taken separately, might not have justified a finding of fraud. But they were mis-statements contained in a prospectus convicted of the grossest fraud in its essential representation. They all dealt with matters which ought to have been within the knowledge of the directors. As to each of these findings, the only question for our consideration is whether there was evidence proper to be submitted to the jury as to the truthfulness of the representations in question; for, if they were false, any jury dealing with such a prospectus would conclude that they were false to the knowledge of the directors.

I entirely agree with the other members of the Court in the view which they take of the evidence adduced in support of each of the findings. But, even if I had come to an opposite conclusion, my judgment would not have been in favour of disturbing the verdict. The finding of the jury upon what I have called the cardinal misrepresentation is in no way mixed up with the subsidiary questions, or with the oral evidence. It rests on documentary evidence so clear that a verdict in favour of the truthfulness of the prospectus could not be allowed to stand, and I therefore agree that the motion should be refused with costs.

Solicitors for the plaintiffs: *Goodbody & Tisdall.*
Solicitors for the defendant: *Horan & Shortt.*

A. E. R. J.
J. H. P.

Q. B. Div. 1899.
April 27, 28.
May 4, 8.

DUBLIN CORPORATION *v.* BRAY TOWNSHIP COMMISSIONERS (1).

(1898. No. 13,694.)

Dublin Corporation — Bray Township — Waterworks, supply — Evidence — Public document — Census — Census Act, 1880 (43 & 44 *Vict. cap.* 28).

By the Bray Township Act, 1866 (29 & 30 Vict. cap. cclxi.), the Corporation of Dublin are bound to supply, from the "Vartry" waterworks, the Bray Township with 20 gallons of water per head of the population of the township, the water to be supplied at a certain "head" or pressure; the Township Commissioners supplying regulating valves at the point of delivery. Bray Township comprises "Big Bray" (in county Wicklow), and "Little Bray" (in county Dublin).

By Provisional Order (confirmed by statute) in 1874, Bray Township might demand and pay for (and the Corporation of Dublin supply) excess water at a certain rate per gallon; but "Little Bray" was excluded from the effect of this enactment until a "special resolution" was passed by the inhabitants. This Order (and statute) still omitted to provide any mode of calculating the population, and the omission was remedied in a Provisional Order (and confirmatory statute) in 1885, by which the calculation of population was to be based on the "last census," and "last preceding census."

By the Dublin Corporation Act, 1897 (60 & 61 Vict. cap. cxxi.) a meterage system was provided; and it was made compulsory on Bray Township to pay for all excess water supplied, it being enacted that, in calculating the statutory supply (20 gallons per head), 30 per cent. should be added to the population, ascertainable as above mentioned. This Act, however, likewise did not apply to "Little Bray," until a "special resolution should be passed."

No such "special resolutions" were ever passed by the inhabitants of Little Bray.

The Dublin Corporation sued the Commissioners of Bray Township for £511 4*s.* 7*d.* excess supply of water to "Big Bray" ("Little Bray" having concededly no powers to pay for any excess). This amount was calculated by ascertaining, on the census returns, the population of Big Bray, adding 30 per cent. thereto, and working out the excess, at the rate per gallon specified in the Order of 1874, over the normal supply of 20 gallons per head per day.

(1) Before Sir P. O'Brien, L.C.J., and O'Brien, and Kenny, JJ.

The defendants lodged £427 in Court in satisfaction of the plaintiffs' claim, alleging that, to ascertain the correct amount, 30 per cent. should be first added to the combined population of "Big" and "Little" Bray, as one unit; that from the sum should be then deducted the actual population of "Little Bray"; and that the excess over the normal supply should be calculated upon the difference.

Held (on new trial motion), that the basis of calculation contended for by the plaintiffs was correct; that they were entitled to judgment for the full amount claimed; and that alleged waste, owing to over-pressure on the valves at the point of delivery, could not be taken into consideration.

The Census Act (Ireland), 1880, containing no provision similar to that to be found in sect. 11 of the Census Act (Ireland), 1890, the plaintiffs, to prove the census and population of Bray in 1880, called one of the Census Commissioners who produced the original draft general report signed by the Census Commissioners of that year, and a print (Blue Book) of the "Abstract" laid by them before Parliament.

Held that, either as originals, or as examined copies of public documents (within Lord Brougham's Act, 14 & 15 Vict. cap. 99, s. 14), these were properly admitted in evidence.

NEW TRIAL MOTION.

The action, which was heard before Mr. Justice Gibson, without a jury, on the 27th February, 1899, was brought to recover the price of excess water supplied, between August, 1892, and June, 1898, by the plaintiffs from the "Vartry reservoir" to the defendants. The defendants lodged £427 in Court in satisfaction, and alleged further that the excess supply was occasioned by excessive pressure of water in the mains at the point of delivery. The defendants also counterclaimed for damages caused by such over-pressure to their pipes. The learned Judge held there was no evidence to sustain the counterclaim; and entered judgment for the plaintiffs for the full amount claimed in the action. The facts and contentions of the parties sufficiently appear, for the purposes of this report, from the headnote and from the judgments.

The defendants now moved to set aside the verdict and judgment so entered, on the ground (substantially) of the admission of illegal evidence and misdirection.

Serjeant Dodd and *T. Healy, Q.C.*, for the defendants.

The Right Hon. The Mac Dermot, Q.C., Drummond, Q.C., and *P. White*, for the plaintiffs.

Cur. adv. vult.

Q. B. Div. 1899.

DUBLIN CORPORATION v. BRAY COMMRS.

May 8.

SIR P. O'BRIEN, L.C.J.:—

This was an action for the price of water alleged to have been taken and drawn by the defendants in excess of their statutory supply, from the 2nd August, 1892, to the 30th June, 1898. The sum claimed was £511 4*s.* 7*d.* The defendants contended that the only sum due was £427, and they lodged that sum in Court. It will be observed that the claim is for water drawn in excess of the statutory power. The defendants contend that the plaintiffs did not give the defendants their statutory allowance, that they were always willing to pay for whatever excess was drawn over the statutory allowance, but that they did not, in fact, get any such excess.

The whole township of Bray is comprised of "Big Bray," which is in the county of Wicklow, and "Little Bray," which is in the county of Dublin. The defendants admit that, so far as "Big Bray" was concerned, the full statutory allowance was made; but they say that it was not made as regards "Little Bray," and that, therefore, the full statutory allowance was not made to the township as a whole, comprising Big and Little Bray.

The 7th section of the Dublin Corporation Act of 1897 provides that the population for the time being of the townships, for the purpose of ascertaining the statutable as well as the excess supply, shall be ascertained as therein provided: save that, as regards the townships mentioned in the first column of the second schedule to the Act (of which Bray was one), for the purpose of ascertaining the statutable supply to be afforded to such townships, there should be added to the population, to be ascertained as aforesaid, the percentage specified in the schedule, that is to say, 30 per cent. The defendants admit that this 30 per cent. was allowed in respect of Big Bray, but they deny that it was allowed in respect of Little Bray.

If the matter rested on the 7th section of the Act of 1897, the defendants would be quite right; but, in my judgment, the 16th section of the same Act completely disposes of this contention. It provides that none of the provisions of the Act of 1897, including, of course, the 7th section, shall apply to "Little Bray" until the special resolution therein referred to

was passed. This was never passed. Therefore, the effect of this was to except Little Bray from the operation of the 7th section until the resolution was passed, and to confine to Big Bray alone, for the time being, the right to the statutory 30 per cent. This, to my mind, is absolutely plain.

The 16th section of the Act of 1897, without more, wholly disposes of the defendants' claim. But the history of the right of the Corporation of Dublin to supply the defendants with water, and to charge them for same, entirely confirms this view. By the 40th section of the Act of 1866, which was styled the Bray Township Act of 1866, power was given to the Bray Town Commissioners to contract with the Corporation of Dublin for a supply of water; and it was provided that they were to get a quantity equivalent to 20 gallons per head per day of the population for the time being, to be paid for by a certain specified sum out of the rates.

This system was pursued for some years. Then came the Act of 1874, which, with the Provisional Order, thereby confirmed, enabled the Bray Town Commissioners, if they served the notice therein provided upon the Corporation of Dublin, to get additional water, and subjected them to a liability to pay for it. But it was provided that the Act should not be extended to Little Bray, except by a special resolution testifying the consent of the inhabitants. This resolution was never passed; nor was the notice contemplated by the 8th section of the Provisional Order, confirmed by the Act of 1874, given. In fact, owing to the action of the Bray Town Commissioners, there was no power of charging for excess water. The necessary notice had not been served. The situation was not, to say the least of it, onerous for the Bray Town Commissioners. They apparently got the excess water, but there was no power to compel them to pay for it.

Then came the Act of 1897, to which I have already referred. A termination was put thereby, or was supposed to have been put thereby; to the long-suffering of the Dublin Corporation. By the 6th section it rendered the townships liable to pay for excess supply of water, notwithstanding the non-service on the Corporation of the notice prescribed by the 8th section of the Provisional

Q. B. Div. 1899.

DUBLIN CORPORATION v. BRAY COMMRS.

Sir P. O'Brien, L.C.J.

Order of 1874. By the 7th section it provided for determining the population of the townships; and, by the 8th section, it specified the price to be charged for excess or surplus water, and defined what excess or surplus water meant.

Later came the all-important 16th section, which excepted Little Bray from the operation of the 7th section, confining, as I have already pointed out, the right, in estimating the population, to an additional 30 per cent. to Big Bray. In fact, as sections 6, 7, and 8 stood, the whole township would have been included. The whole township comprised Big and Little Bray; but Little Bray, until the resolution therein mentioned was passed, was excepted by the 16th section from the operation of the 6th, 7th, and 8th, leaving, in the actual state of things, these sections applicable to Big Bray alone. This is entirely borne out, not only by the opening words of the 16th section, which states that none of the provisions of the Act "shall apply to or in any way affect" Little Bray until the necessary special resolution is passed, but by the two provisoes in the section, the one as to meterage of the water supplied to Little Bray, and the other as to the ascertainment of the population of Little Bray by the census for the time being in force. The entire section, its opening enacting words, and its provisoes, indicate a complete cleavage of the township for purposes of charging for water; and show that, for the purpose of excess water supply, until the special resolution was passed, Bray Township was no longer, as has been so emphatically contended, an undivided unit.

So much for the main contention of the defendants. An extremely immeritorious point was made that the census was not properly proved. The books from the office in Dublin were produced, and a printed copy of the Abstract laid before the House of Commons. If the books in the office here, and the Abstract in the House of Commons are not the census, what is the census? And, if they are the census, is it to be said that it cannot be proved? The Act of 1890 only supplied a short method of proving it by a certificate from the Registrar General; but it does not follow, because that Act was passed, that it could not be proved before it was passed. I think both the book here, and the Abstract in the House of Commons, originals. They are made out under express statutable sanction and direction, with great care and particularity. The

census is essentially of a public nature, to be used for public, governmental, and legislative purposes, and prepared, as I have said, under statutable authority.

The case of *Richardson* v. *Mellish* (1) is very important on this point. There it was held that books containing lists of passengers deposited at the India House pursuant to the 53 Geo. 3, c. 155, were admissible in evidence towards showing the value of a voyage. Best, C.J., in giving judgment in favour of the admissibility of the books said—and I say the same with reference to the book and abstract here—"This is a public paper, made out by a public officer, under a sanction and responsibility which impel him to make that paper out accurately." So the census is a public paper made out by public officers under a sanction and responsibility which impel them to make it out accurately.

As to the defendants' claim for waste, this I think unsustainable. By the Act of 1866, section 49, a minimum pressure was fixed; there was no maximum fixed; and, under that section, the defendants had power to make valves which would regulate and control the velocity of the water. The 11th section of the Act of 1897 is all-important; it provides that what shall be registered by the meter shall be conclusive of the quantity supplied; and I think it is plain that it was intended that what was supplied should be paid for. "Drawn" and "used" in section 6, and "supplied," in section 11, are really convertible terms; and, if the water was taken, the defendants should pay for it. The case of *The Sheffield Waterworks Co.* v. *Bingham* (2), which was referred to by The Mac Dermot is in point.

There must be judgment for the plaintiffs for the full sum, with the costs of the trial and of this argument.

O'BRIEN, J.:—

Under the Bray Township Act of 1866, the Commissioners were authorized to contract with the Corporation of Dublin for a public water supply; and some of the questions involved in the present dispute between them are capable of being solved by a simple perusal of the statutory enactments for that purpose. The

(1) 2 Bing. 229, 240. (2) 25 Ch. D. 443.

Q. B. Div. 1899.

DUBLIN CORPORATION v. BRAY COMMRS.

O'Brien, J.

Corporation were to supply the water at the rate of twenty gallons per head of the population from their mains through pipes connected with the mains to be laid down and maintained by them, capable of delivering the water under a head of not less than 250 feet above the level of the sea, for a yearly rent of four-pence in the pound on the valuation, the Commissioners to supply at the point of delivery a valve or valves properly constructed at their own expense. In this contract there was no distinction between different parts of the township. That first arose when the amendment took place by the Provisional Order of 1874, passed for the purpose of an extra water supply, to be charged for at a certain rate, on its appearing that the necessary notices had not been served on the inhabitants of Little Bray, the portion of the township in the county of Dublin; and the divorce thus begun has been steadily maintained throughout all the subsequent enactments down to the very last, of 1897, the population of that part being shrewd enough to perceive that, by the consequence of the slip in the proceedings they were in possession of all the advantages and were exempt from the burthens of the union. The intention to insist upon the divergence is shown in an emphatic manner by the 3rd section of the Act of 1874, which says that none of the powers conferred by the Provisional Order shall be exercised with respect to so much of the township of Bray as lies within the county of Dublin unless and until the consent and approval of the inhabitants shall have been given in the manner provided by the 32nd section of the Local Government (Ireland) Act, 1871, which condition is repeated in the 16th section of the Act of 1897. Now, the reference to the Local Government Act of 1871 measures in some respect the scope and extent of this condition, for the section referred to is that which provides the machinery necessary for rendering any part of that statute applicable to any township within the county of Dublin, without which such township should be wholly outside it.

There are three questions in the case:—First, whether the assumed increase of 30 per cent. can be applied to the population of all Bray, so as to lessen the excess chargeable against the part of the township in the county of Wicklow; secondly, as to the evidence of the census as to the means of ascertaining the allowed

supply; and, thirdly, as to the point of undue pressure resulting in waste or loss of water, whether under the counterclaim, or in diminution of the claim, as for water to that extent not taken or used.

As to the first, looking at the reason of the thing, it would seem extraordinary that there should be a constructive addition to the population of Little Bray, while Little Bray was not liable to be charged at all for the extra water, for the purpose of relieving the rest of the township, which was alone liable, just as if a tenant were to have a nominal abatement of his rent, for the purpose of giving a real abatement to his neighbour. It is conceivable, of course, that at first the thirty per cent. should have been applied all round, as the reason of it might be said to be common to both parts of the township, and to be a measure of the ordinary supply, and independent of the charge for extra water. Why, it might be said also, if there were no statute, should not Little Bray be able to make a present of its *bonus* of percentage, in case of the rest of the township, as a person could give his allowance of any other article which he did not wish to consume himself, to increase the average supply of others. But while legislation does not proceed upon grounds of liberality without reason or motive of interest, there was a distinct motive for the privilege being confined to the rest of the township, for there was a new consideration moving from it in the agreement to pay for extra water, which would bring directly under notice the probable amount of the increased consumption, and would lead directly, as part of the contract, to a discount being allowed off the increase. Little Bray was wholly taken out of the Act of 1874, until a special resolution brought it within it; and the same exclusion is continued into the Act of 1897, with an express reference to the same condition. The mistake that is made is that which so commonly occurs in the construction of statutes, of adopting the literal extent of subjects, which are still necessarily subject to restriction. The seventh section of the Act of 1897 says that, for the purpose of determining the statutable supply, the percentage specified shall be added to the population of the townships mentioned in the schedule, of which there are several besides Bray. Bray, no doubt, would comprehend the whole township, if there were

Q. B. Div. 1899.

DUBLIN CORPORATION v. BRAY COMMRS.

O'Brien, J.

nothing else; and the object of the stated addition, "to determine the statutable supply," is one that applies to all parts of the township. But the argument from the words "statutable supply," no less than the enactment itself in reference to Little Bray, is swept out of the statute by section 16, which says that none of the provisions in the Act shall apply to or in any way affect Little Bray until the special resolution shall have been passed. It is impossible to get over the generality of this enactment. It takes Little Bray wholly out of the Act. The Act of 1874 says none of the powers shall be exercised, and this says none of the provisions shall apply; and the effect of the enactment is distinctly connoted by the fact that the Legislature considered it necessary to reserve to the Corporation the power to use valves for the purpose of distinguishing the quantity of water supplied to Little Bray, so as to enable the supply to the remaining portion of the township to be ascertained, and the excess to be paid for, as if, without such reservation, no power remained to adopt means of calculation, though Little Bray was not affected by it at all. This seems to me to put an end to the question of bringing Little Bray into hotchpot, and carrying over a percentage from it to the credit of the rest of the township. Little Bray may have as much reason as the rest of Bray for a contingent allowance of water, but that is not the contract in the statute. The observation of Mr. Justice Kenny is also of great weight, that, under the proviso, the mode of arriving at the population of Little Bray is different from that as to the rest of the township. I have endeavoured to follow Serjeant Dodd in the observations he makes as to the effect of the proviso, but am not quite certain that I apprehend clearly the view he wishes us to take. He asks why should the population of Little Bray be taken for the purpose of distinction otherwise than with the addition of the thirty per cent. But the population must be ascertained, because the supply is not a fixed quantity, but proportional to the consumers. The right to the twenty gallons a head exists under the Act of 1866, and is independent of the Act of 1897. That is a constant quantity to be deducted from the total supply; and indeed I have not a very clear view of the use of the meters, except to see that Little Bray receives no more than the twenty gallons, and that the whole of the residue

is chargeable to the rest of the township. But the object of the provision is open to the same ambiguity, if any, with or without the addition of the percentage.

As to the second point, the evidence of the census, I am of opinion that the proof was in accordance with the strictest rules of law. The Documentary Evidence Act was intended merely to facilitate the evidence by copies, leaving it still to be determined, by the tribunals, what are the documents of such a public nature as to be evidence on their mere production; and indeed it is impossible to suggest any condition of admissibility which is not satisfied by the census, taken by official machinery, in pursuance of an Act of Parliament, and I believe protected in some respects as to its accuracy—I am speaking from recollection—by penal provisions. The document signed by the Commissioners, and produced at the trial, was undoubtedly an original, and legal evidence of the population. So also no less clearly was the Abstract required by the statute, and submitted to Parliament. The printed copy of either, produced and sworn to be a copy, was sufficient legal evidence; and, indeed, it is a highly technical distinction, arising from the custody alone, to say that two impressions taken from the same type would not be in the same position as two documents written by the same hand, and identical with an original.

I am also of opinion, that the defendants cannot rely upon the waste, resulting from the alleged excessive head, either in diminution of the "quantity taken or used," by way of denial in the defence or on the question of the sufficiency of the lodgment, or by way of counterclaim. The case cited—*Sheffield Waterworks Co.* v. *Bingham* (1)—is a distinct authority on that point; and the statutes themselves, the power given to the Commissioners to fix a valve or valves, in requiring a *minimum* of head, and leaving the matter open in the other direction, without a maximum, and in making the meters (by section 11) conclusive, where there is no defect in the register or their construction, and no defect in the machinery of transmission or supply—all lead necessarily to the conclusion, without which it would be impossible for water companies to carry on their

(1) 25 Ch. D. 443.

Q. B. Div. 1899.

DUBLIN CORPORATION *v.* BRAY COMMRS.

O'Brien, J.

business, that their duty and responsibility end on bringing the water to the point where it is to be received; and that the consumers are to take it in the measure, and by the means, to which they are entitled. The defendants, therefore, in my opinion, fail on all points.

KENNY, J.:—

I concur in the judgments that have been delivered.

Three questions were discussed before us. First, as to the right of the Bray Commissioners to have their water supply, to what I may call "Big Bray," calculated, under the Act of 1897, on the basis of 30 per cent. being added to the population of the *entire township*, or on the basis of the 30 per cent. being added to the population of Big Bray only; secondly, as to the evidence of population offered by the Corporation for the purpose of calculating the capitation allowance of water; and, thirdly, as to the right of the Commissioners to deduct 10 per cent. from the plaintiffs' claim in respect of alleged waste of water from undue pressure at the point of delivery.

The controversy on the subject of the water supply by the Corporation of Dublin to the Bray Commissioners and those of Kingstown is not one of modern date. Litigation on the subject arose so far back as 1884, and two Acts of Parliament, the one in 1885, and the other in 1897, have not brought to a determination the issues between the parties. Throughout the controversy a matter of extreme importance between the litigants was with reference to the basis on which the population of the township who were to be supplied with water from year to year, was to be calculated, and the character of the evidence which was to legally prove the numbers of the population. The vigour of the arguments that have been addressed to us on the present motion show that in the minds of the Bray Commissioners this matter still presents itself in an acute form.

Stated very briefly, the facts are these. By the Bray Township Act of 1866, sect. 49, the plaintiffs were bound, after receiving notice from the defendants, to supply the township with water to the extent of twenty gallons per day per head of the population for the time being, at a yearly rent equivalent to 4*d.* in the £, on

the valuation of the rateable property in the township. The water was to be delivered at high pressure at a certain point, under a head of not less than 250 feet above sea level, and the defendants were to supply a valve or valves at the point of delivery. Save in the division of the township into wards, no distinction is taken, in this Act, between Big and Little Bray. Its provisions apply to the whole township, with the obvious result that, while the Corporation had it always in their power to ascertain by meter the precise quantity of water they were from time to time supplying, they had absolutely no means of determining, with anything approaching certainty, whether the township was receiving a quantity larger, or smaller, than that to which it was legally entitled under the section to which I have referred. The defect in the Act was the absence of a provision for a mode of ascertaining the numbers of the population. As might be expected, the plaintiffs alleged that they were supplying an amount far in excess of the statutable quantity; and, inasmuch as they had no power to compel payment for such alleged excess, and the Bray Commissioners had no power to pay for it, a Provisional Order, dated the 8th May, 1874, was made by the Local Government Board (Ireland), and confirmed by Act of Parliament in the same year, whereby power was given to the plaintiffs to supply, and to the defendants to demand and pay for, any water supplied by the former over and above the statutable quantity, at a rate not exceeding 4*d.* per 1000 gallons; but by the confirming statute, section 3, that portion of the township situate within the county of Dublin (and known as Little Bray) was excluded from the effect of the Provisional Order unless and until a resolution was passed by the township electors in Little Bray consenting to the Order.

While this Act and Provisional Order conferred powers of supplying and paying for excess water, it still made no provision for ascertaining the numbers of the population, and supplied no means for determining whether, as a matter of fact, excess water was being supplied. The question between the two bodies remained a burning one; and, eventually, in 1884, the Corporation were defeated in an action which they brought against the Commissioners of Kingstown—who occupied a position similar to

Q. B. Div. 1899.

DUBLIN CORPORATION v. BRAY COMMRS.

Kenny, J.

that of the Bray Commissioners—for recovery of an amount due for water. It is stated that the plaintiffs were non-suited by reason of failure to legally prove the population that was entitled to the statutory allowance. Consequent on that defeat, the Corporation applied to the Local Government Board for a further Provisional Order, whereupon the Kingstown Commissioners applied for a writ of prohibition to prevent the Board from making the Order. The writ was refused by the Exchequer Division, and their decision was affirmed by the Court of Appeal: *Re The Local Government Board, Ex parte The Commissioners of Kingstown* (1). The Provisional Order was made on the 8th May, 1885, and was duly confirmed by Act of Parliament; and, by their combined effect, facilities for ascertaining the quantity of water, both statutory and excess, were for the first time provided. Having in the first place made provision for an agreement between the two bodies as to the mode of ascertaining the population from time to time, the Order declared (by clause 7) that the last Parliamentary Census, with an addition or subtraction of one-tenth of the difference between the population, according to such census, and the *immediately preceding* census should represent the "population" for the year in respect of which the payment for water was to be made. It will be observed that, although this Order extends to the entire township of Bray, the exclusion of Little Bray from the operation of the Order of 1874, unless and until the resolution to come within it was passed, had the effect of leaving Little Bray in the same position, as to excess water, as it occupied before the Order of 1874, inasmuch as it had no power, in the absence of such a resolution, to demand or pay for excess water at all. Little Bray never has passed such a resolution, and it is admitted that, though it may in fact be drawing excess water throughout all these years up to the present time, it cannot be compelled to pay for it. That is a somewhat surprising state of affairs, when it is borne in mind that the Corporation, in supplying that part of the township with its supposed capitation allowance, has no standard by which they can legally measure the number of

(1) 16 L. R. I. 150; 18 L. R. I. 509.

"heads" of the population, each of whom is entitled to the statutory allowance of 20 gallons per day. As to Big Bray, it had the power, under the Provisional Order of 1874, of paying for excess water, provided it made a demand for it; and a mode was afforded of ascertaining the quantity. But Big Bray up to 1897 never did make a demand for excess water, while, at the same time, it was conceivable that the township, as a whole, might be receiving in respect of Little Bray a quantity of water in excess of the statutory supply to which the latter part of the township was entitled. If, as a matter of fact, that were so—and I may add that I offer no opinion on it—it was a clear evasion of the defendants' liability to pay for excess water. The possibility of such a state of things, to put it no further, led to the passing of the Dublin Corporation Act of 1897, which provided a meterage system, and made it compulsory on the Bray Commissioners to pay for all excess water, taken or used by the township, over and above the statutory requirement of 20 gallons a-head per day.

I now come to consider the three questions, which at the outset of my judgment I stated were discussed before us. The action is brought in respect of excess water supplied to Big Bray only. It could not be brought for excess water supplied to Little Bray, for the resolution I have already mentioned has never been passed, and consequently Little Bray has no power to pay for excess water. The Bray Commissioners have paid into Court a sum of £427; and their case is that, if 30 per cent. be added to the population of the whole township under the 7th section of the Act of 1897, and the excess water calculated for Big Bray on that ascertained population, *minus* the *actual* population of Little Bray, the sum which they have lodged is sufficient under the statutes. In other words, they contend that Big Bray is to get the whole benefit of the 30 per cent. which they add to the entire township. It is needless to point out that this contention would give to Big Bray the whole of the excess water which the calculation allots to both Big and Little Bray. In my opinion there is no warrant for such a claim. The 5th section of the Act of 1897 imposes on the township, as a whole, the obligation of paying for all excess water taken or used. The 7th section, still

Q. B. Div. 1899.

DUBLIN CORPORATION v. BRAY COMMRS.

Kenny, J.

dealing with the township as a whole, provides that, for the purpose of determining the statutable supply, there shall be added to the population, as ascertained by the Provisional Order of 1885, a percentage of 30; but, by the 16th section, it is enacted in the plainest language that none of the provisions of the Act are to apply to or affect Little Bray, unless and until the special resolution referred to in the Provisional Order of 1874 has been passed. I entertain no doubt as to the true construction of these words. The resolution has not been passed, and Little Bray stands outside the Act. It is said that the subsequent paragraph of sect. 16, which states that the population of Little Bray is to be ascertained for the purposes of the Act by the census for the time being in force, shows that the population of the township, as a whole, is to be regarded as the unit; but it does not occur to me that any such meaning can be attributed to this section. I think that this provision, which applies a different mode of ascertaining the population of Little Bray from that applicable to Big Bray, was inserted for the purpose of providing a statutory guide to the population of Little Bray in the supply of the statutable quantity, instead of leaving the matter at large as it had hitherto been. The true construction of the entire statute on this point will be arrived at, in my opinion, by applying the 30 per cent. distributively over the two portions of the township in accordance with the contention of the plaintiffs.

The next question arises out of the objection made at the trial to the admission of the evidence given by the Corporation in proof of the population of Big Bray. The Census Act of 1890, sect. 11, provides for a certificate from the General Registry Office, signed by the Registrar General, being admitted as evidence of the population at the last census. The Census Act of 1880 contains no similar provision, but, in common with the Act of 1890, it provides for the registering of the returns by persons to be appointed by the Lord Lieutenant, and for an Abstract thereof being laid before Parliament. At the trial, Mr. Matheson, the Assistant Registrar General, who was one of the Census Commissioners, appointed not only in 1891, but also in 1881, to digest the returns, produced in the first place a certificate of the population of Big Bray according to the census of 1891. But, it being necessary

for the plaintiffs' case, under the seventh clause of the Provisional Order of 1885, also to show the population according to the 1881 census, Mr. Matheson produced a draft general report signed by the three census Commissioners of that year, showing the result of the tabulation of the census papers of 1881. That report referred to and incorporated the tabulated matter, which included the population of Bray as a whole. It also referred to other sectional reports, one of which, as I gather, stated the separate figures for Big and Little Bray. Mr. Matheson also deposed that the Blue Book produced was a copy of the original report and tabulated matter which had been presented to Parliament. In my opinion, this was ample evidence of the population of Big Bray in 1881. The Commissioners made their report under statutory authority, and the original report, embodying the result of these inquiries, is produced from the proper custody, and proved by one of the signatories to it. It incorporates the sectional reports, one of which has been produced before us in the shape of another Blue Book; and, though it does not appear from the Judge's report whether Mr. Matheson intended in his proof of "the Blue Book" to include the sectional one also, I think that he must have done so, for no objection was raised to our looking at it. What the defendants contended was that no provision was made for any particular document being regarded as "the Census" of 1881, or as evidence of the census, and that, if a report, or table of figures signed by the Commissioners, was to be treated as the census, the production of this Sectional Blue Book could not be regarded as proper proof of the original. As to the first objection, the Census Commissioners were public officials acting under statutory authority in conjunction with the Chief or Under Secretary for Ireland (Census Act (Ireland), 1880) for the purpose of compiling statistics for the use of the public. The returns to be made by these Commissioners are collected from the most authentic sources and are of the highest authority, and of the greatest practical use, in all matters relating to the comparative, social, industrial, literary, and moral development of the various parts of the United Kingdom. These returns are open to the public, they are made for the public, and cannot but be treated as public papers: *Sturla* v.

Q. B. Div. 1899.

DUBLIN CORPORATION v. BRAY COMMRS.

Kenny, J.

Freccia (1). That being so, I think it could not be doubted that, if there was produced an original digest or abstract signed by the Census Commissioners and showing the population of Big Bray, as one of their returns in pursuance of the Act, that digest or abstract would be properly admissible in evidence of what the statute directed them to inquire into: *Richardson* v. *Mellish* (2). The original abstract showing the separate population of Big Bray is not produced, but a copy, in the shape of a Blue Book purporting to represent the original as signed by the three Commissioners, is given in evidence. The Census Commissioner, I take it, in effect deposes to that Blue Book being a copy of the one that bears his signature. I think on that evidence that it comes within Lord Brougham's Act (14 & 15 Vict. c. 99, sect. 14), and was properly received as an examined copy.

The third point is this. It was alleged for the defendants that during the period 1897–1898, covered by the plaintiffs' claim, the water was kept at so high a pressure by the plaintiffs that it caused a very great waste, for which the defendants ought not to be held responsible, and the amount of which ought to be deducted from the plaintiffs' demand. The Act of 1866 provided for a minimum pressure of 250 feet, and a controversy has arisen as to whether that amount was exceeded, and, if it was, whether legitimately so. In my opinion the 11th section of the Act of 1897 precludes us from entertaining the defendants' claim. That section provides that the registers of the meters are to be conclusive evidence of the quantity of water supplied by the plaintiffs, and that quantity I consider to be equivalent to the "supply," mentioned in sect. 6, which may be "taken as used" by the defendants, and for which they are obliged to pay. If there be waste in their township it would seem to me that they must bear the loss; if the meters are not properly registering, they have their appeal to the Board of Trade.

I therefore concur in thinking that the defendants' motion should be refused, and that the judgment for the plaintiffs should stand; and I will only add this, that the arguments we have

(1) 5 App. Cas. 623. (2) 2 Bing. 229; 27 Rev. Rep. 603.

listened to and the proceedings and evidence at the trial have left the strong impression on my mind that no expedient, no technicality, has been left unresorted to by the defendants to defeat what I hold to be a legal and a just claim.

Solicitor for plaintiffs: *H. Bonass.*
Solicitors for defendants: *Hamilton & Craig.*

A. E. R. J.

REG. (THE SECRETARY OF STATE FOR WAR) *v.* JUSTICES OF COUNTY CORK (1).

Defence Acts, 1842 *to* 1892—*Lands Clauses Consolidation Acts*, 1845, 1860—*Lands taken compulsorily — Notice to treat — Compensation — Persons having "no greater interest than as tenant for a year or from year to year"—Tenant from year to year at a judicial rent—Justices—Jurisdiction — Defence Act*, 1842 (5 & 6 *Vict. c.* 94)—*Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18)—*Lands Clauses Consolidation Amendment Act*, 1860 (23 & 24 *Vict. c.* 106)—*Defence Act*, 1860 (23 & 24 *Vict. c.* 112)—*Land Law* (*Ireland*) *Act*, 1881 (44 & 45 *Vict. c.* 49), *ss.* 5, 8, 13.

The Secretary for War, requiring certain lands for the defence of the realm, served a notice, dated 7th March, 1898, calling upon the occupying tenants to treat for the purchase of same, and to send in particulars of their claims. Mary Sullivan, a tenant on whose holding a fair rent had been fixed, sent in a claim, but declined to accept the amount of compensation subsequently offered to her. In October, 1898, she was served with a summons, calling upon her to attend at Petty Sessions, before two Justices, for the purpose of hearing and determining the question of the disputed compensation. She appeared by her solicitor, who objected to the jurisdiction. Four Justices adjudicated, and, being of opinion that they had no jurisdiction, dismissed the case.

The Defence Act, 1842, provides that if for a space of fourteen days after notice to treat, the parties interested fail to treat or agree, certain steps may

(1) Before SIR PETER O'BRIEN, L.C.J., and O'BRIEN and GIBSON, JJ.

Q. B. Div. 1899.

THE QUEEN v. JUSTICES OF CORK.

be taken to put the War Department into immediate possession of the lands required, and to have the compensation assessed by a jury. The Lands Clauses Act, 1845, provides that, if for a space of twenty-one days after notice served the parties do not treat and agree, then (section 121) "if any such lands shall be in the possession of any person having no greater interest therein than as tenant for a year or from year to year, the amount of such compensation shall be determined by two Justices in case the parties differ about the same." The Lands Clauses Act, 1860 (23 & 24 Vict. c. 106), by section 7, provides that, for the purchase of any lands wanted for the defence of the realm, it shall be lawful for the Secretary for War to use the provisions of the Act of 1845, but that this shall not affect his powers under the Defence Acts. The Defence Act, 1860 (23 & 24 Vict. c. 112) provides, sect. 12 ("determination of amount of compensation otherwise than by agreement"), that if, for fourteen days after service of the notice therein mentioned, a party interested fail to treat or agree, the amount of compensation "shall be settled by a jury in like manner as if the same were compensation for lands surveyed" under the Defence Act of 1842; and sect. 46 provides that the provisions of this Act in regard to serving notices, and concerning the determination of the amount of compensation for land otherwise than by agreement, shall be applicable where lands are surveyed and marked out under the Defence Act, 1842.

A Conditional Order for a writ of mandamus commanding the Justices to entertain the case having been obtained, and Mary Sullivan having moved to discharge the same:—

Held, that a tenancy from year to year, on which a "fair rent" had been fixed by the Irish Land Commission for a statutory term, is not such a yearly tenancy as was contemplated by sect. 121 of Lands Clauses Act, 1845, and that the Conditional Order must be discharged.

But held, by Sir P. O'Brien, L.C.J., and Gibson, J., that the procedure under the Defence Act, 1860, is cumulative, and does not exclude the use of the Lands Clauses Act, 1845, under the powers given by the Lands Clauses Act, 1860, section 7. *Quaere* (*per* Gibson, J.) as to the effect of using the procedure under the Lands Clauses Code and under the Defence Code concurrently.

Held further, that as the notice to treat (though it mentioned fourteen days) had not been acted upon for more than twenty-one days, it would have been sufficient, in a proper case, to found the jurisdiction of the Justices under sect. 121; and further, that the objection, if any, had been waived.

MANDAMUS. This was a motion on behalf of Mary Sullivan, a tenant for a statutory term of certain lands in Bear Island, Bantry Bay, to discharge a Conditional Order for a writ of man-

damus, which had been obtained on the part of Her Majesty's Principal Secretary of State for the War Department, directed to the Justices of the county of Cork, commanding them to enter continuances and to hear and determine an application on the part of the Secretary for War to assess the purchase-money and compensation to which Mary Sullivan as such tenant was entitled in respect of the compulsory taking, for the defence of the realm, of portion of the lands so held by her.

The Conditional Order had been obtained on behalf of the Secretary for War, by Mr. W. G. Towers, solicitor, acting under power of attorney from the Secretary for War. The facts, as set out in that affidavit, were shortly these. Certain lands in Bear Island, county Cork, being wanted by the Secretary of State for the War Department, and having been duly surveyed and marked out under the Defence Act, 1842, the Ordnance Board Transfer Act, 1855, and amending Acts, the taking of same for the public service was formally sanctioned by a certificate of Deputy Lieutenants of the county, certifying the necessity and expediency of such taking, and by a Treasury warrant authorizing the taking of the same (Defence Act, 1842, sect. 23); and a warrant of Justices of the Peace, dated the 4th Nov., 1898, was obtained, commanding that possession should be forthwith delivered to Mr. Towers, on behalf of the Secretary for War. By deed-poll, dated the 28th June, 1894, the interest of the land owners in the lands as reversioners was conveyed to the Secretary for War.

The lands so taken were in the occupation of some thirty-three tenants, some of them holding for statutory terms at fair rents fixed by the Irish Land Commission. The respondent, Mary Sullivan, whose name was the first in the list, held portion of the lands taken, and conveyed by the deed-poll of June, 1894, as tenant from year to year of two holdings, containing altogether some thirty acres, statute measure, in respect of which fair rents had been fixed, amounting to £15 10*s*.

A formal Notice to Treat, dated the 7th March, 1898, and signed by Mr. Towers, as attorney for the Secretary for War, was, on the 1st April, 1898, served on the respondent Mary Sullivan and the other tenants of the lands taken.

Q. B. Div. 1899.

THE QUEEN v. JUSTICES OF CORK.

The Notice to Treat was as follows:—

The Defence Act, 1842, *The Ordnance Board Transfer Act*, 1855, *The Act*, 22 *Vict. c.* 12, *The Defence Act*, 1860, *so far as incorporated into The Defence Act*, 1842, *The Lands Clauses Consolidation Acts Amendment Act*, 1860, *sect.* 7, *and The Ranges Act*, 1891, *sect.* 11.

To MARY SULLIVAN, Rerrin, Bear Island . . . [and 32 others] . . .

And to all other bodies or persons authorised under the above mentioned Acts to contract on behalf of themselves or others, or otherwise, in relation to the lands, buildings, tenements, hereditaments, or easements, situate in Bear Island, in the Barony of Bear, Parish of Killaconenagh, and County of Cork, described in the Schedule to this notice, or shown on the plan annexed hereto, or any of them, and to the Chief Officer or Officers of any such body as aforesaid, and to all other persons, owners of or interested in the said lands, buildings, tenements, hereditaments, or easements, or any of them.

On behalf of Her Majesty's Principal Secretary of State for the War Department, I hereby give you and each of you notice:—

(1.) That under the provisions of the above mentioned Acts he requires to purchase absolutely the said lands, buildings, tenements, hereditaments, and easements (the same having been duly marked out and surveyed, as required by the said Acts, and the taking of the same having been duly authorised by warrant under the hands and seals of two of the Lords Commissioners of Her Majesty's Treasury pursuant to the same Acts) described in the said Schedule.

(2.) And that he is willing and hereby offers to treat and agree with you, and each of you, according to your respective titles, estates, powers, and interests (if any) for such purchase.

(3.) And that you are hereby required, within fourteen days after service of this notice, to state the particulars of your respective claims in respect of any of such lands, buildings, tenements, hereditaments, and easements, and to treat with the said Secretary of State as to the amount of purchase-money, compensation, or consideration to be paid in respect of the same.

(4.) And that you are further required to state the particulars of your respective estates and interests in such lands, buildings, tenements, hereditaments, and easements.

(5.) And that if for such fourteen days you, or any of you, fail to state such particulars of claim as aforesaid, or refuse to treat as aforesaid, or do not within such fourteen days agree with the said Secretary of State as to the amount of such purchase-money, compensation, or consideration, or by reason of absence are prevented from treating or agreeing as aforesaid, the said Secretary of State will proceed under the said Acts to do all things necessary for having the amounts of purchase-money, compensation, or consideration settled under the

said Acts, and for obtaining possession of the said lands, buildings, tenements, hereditaments, and easements.

(6.) And that the said Secretary of State requires that the compensation to be paid for the said lands, buildings, tenements, hereditaments, and easements shall be settled by arbitration and not by reference to a jury; and in the case of persons having no greater interest therein than as tenant for a year, or from year to year, that the amount of such compensation shall be determined by two Justices, pursuant to the above mentioned Acts.

Any claim, notice or communication under or relating to this notice should be delivered to the undersigned Solicitor, or left for him at his office at the Chief Secretary's Office, Dublin Castle.

IN WITNESS, etc. . . . 7th March, 1898.

(Signed). W. C. TOWERS.

On the 2nd May, 1898, Mr. Maurice Healy, solicitor, wrote to Mr. Towers, giving him notice of the particulars of the claims of certain of these tenants, including Mary Sullivan, in respect of the lands, buildings, tenements, hereditaments, and easements, owned or occupied by them and proposed to be taken, and particulars of their respective estates and interests in said lands, in a schedule. In this schedule Mary Sullivan's claim was set down as £700, in respect of two holdings, both held under contracts of tenancy from year to year, for a statutory term, at a fair rent.

On behalf of the Secretary of State, a sum of £219 5*s*., the amount estimated by a valuer of experience employed by the War Department, was offered to Mary Sullivan for the purchase of her interest in the two holdings; but this amount she declined to accept. The other thirty-two tenants, with one exception, having also declined to accept the amounts fixed by the same valuer, and offered to them in respect of their interests in the land, Mr. Towers applied, under the provisions of the Defence Act, 1842, the Lands Clauses Consolidation Acts Amendment Act, 1860, and the Acts incorporated therewith, to a Justice of the Peace for the county of Cork in regard to the question of disputed compensation so arising; and the Justice thereupon issued a summons directed to the respondent Mary Sullivan, calling on her to appear on the 4th November, 1898, at Castletown-Bearhaven Petty Sessions, before such two Justices of the Peace as might then be there "for the purpose of hearing and determining the question of disputed compensation between the said Mary Sullivan and the Secretary

Q. B. Div. 1899. THE QUEEN v. JUSTICES OF CORK.

of State." This summons was served on the respondent on the 27th Oct., 1898. Similar summonses were issued and served on the other tenants who had declined to accept the amounts offered.

The cases came on for hearing on the 4th November, 1898, at Bearhaven, before Mr. Purdon, R. M. (chairman), Colonel A. Pearse, R. M.; Charles V. Handcock, and J. D. Lyne, M. D., Justices of the Peace. The Secretary of State was represented by counsel; and the respondent Mary Sullivan and the other tenants by Mr. Maurice Healy, solicitor.

The first case (Mary Sullivan's) being called on, counsel for the Secretary of State requested the Justices to proceed to assess the compensation, but Mr. Healy objected to the jurisdiction of the Justices upon the following grounds:—

"*First*, That the Justices had no jurisdiction in any of the cases, because sect. 19 of the Defence Act, 1842, which was the basis of their jurisdiction, required a jury, and sect. 7 of the Lands Clauses Consolidation Acts Amendment Act, 1860, under which, and the incorporated provisions of the Lands Clauses Consolidation Act, 1845, Justices had power to assess compensation in respect of lands in the possession of any person having no greater interest therein than as a tenant from year to year, was impliedly repealed by sect. 12 of the Defence Act, 1860, which was passed eight days later, and required the amount of compensation to be settled by a jury in case of any dispute.

"*Secondly*, That the Justices had no jurisdiction to assess compensation in the case of Mary Sullivan, or in any case where a judicial rent had been fixed, because a judicial tenant had a greater interest in the lands than a tenant from year to year within the meaning of the Lands Clauses Consolidation Act, 1845; and

"*Thirdly*, That the notice to treat could not operate under the Lands Clauses Consolidation Act, 1845, because that Act was not referred to in it, and also because under that Act it should have been a twenty-one day notice."

Upon this, after hearing counsel for the Secretary of State, the Justices, considering the said objections well founded, refused to assess the purchase-money and compensation, and dismissed the summons in the case of Mary Sullivan for want of jurisdiction, and adjourned all the other cases in order that an application for a writ of mandamus, to compel them to assess such purchase-money and compensation, might be instituted.

Counsel on behalf of Mary Sullivan now moved to show cause against the making absolute of the Conditional Order so obtained, and to have the same discharged.

A fuller summary of the various statutes forming the Defence Code will be found in the report of *Reg.* (*Moore*) v. *Abbott* (1). The enactments with which the present case is more particularly concerned are briefly these:—

The Defence Act, 1842 (5 & 6 Vict. c. 94), provides, by section 19, that, after the lands acquired have been marked out and surveyed, if "for a space of fourteen days after notice" (to treat), the parties interested "decline to treat or agree," two Justices may issue their warrant commanding immediate possession to be delivered to the War Department, "and shall also issue their warrants to the sheriff . . . to summon a jury," to find the compensation to be paid for the absolute purchase or for the possession or use of such lands.

The Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), defines (sect. 3) "the expression 'two Justices' as meaning 'two Justices assembled and acting together.'" Sections 16, *et seq.* provide for the procedure "with respect to the purchase and taking of lands otherwise than by agreement." Section 19 deals with the service of "notices to treat" on the owners and occupiers of the lands proposed to be taken; section 21 provides that, "if for twenty-one days after the service of such notice," any party interested fails to treat or agree, the question shall be settled as provided, *i.e.*—in regard to owners or persons under the Act enabled to convey or release any lands taken . . . or any interest in such lands—where the amount claimed is under £50, the question shall be settled by two Justices (section 22)—and, where over £50, by arbitration or a jury at the option of the claimant. Section 24 provides for the procedure before such two Justices. Sections 119 to 123 are headed:—"With respect to lands subject to leases": section 119 providing that, where a portion of a leasehold interest for a term of years unexpired is taken, the rent payable on the portion not taken, if not settled by agreement, "shall be settled by two Justices"; and section 120, that every such lessee shall be entitled to compensation for the damage done by reason of severance or

(1) [1897] 2 Ir. R. 362.

Q. B. Div. 1899.

THE QUEEN v. JUSTICES OF CORK.

otherwise by reason of the execution of the works. It is then provided:—

(Sect. 121.) "If any such lands shall be in the possession of any person having no greater interest therein than as tenant for a year or from year to year, and if such person be required to give up possession of any lands so occupied by him before the expiration of his term or interest therein, he shall be entitled to compensation for the value of his unexpired term or interest in such lands, and for any just allowance which ought to be made to him by an incoming tenant, and for any loss or injury he may sustain, or if a part only of such lands be required, compensation for the damage done to him in his tenancy by severing the lands held by him, or otherwise injuriously affecting the same; and the amount of such compensation shall be determined by two Justices in case the parties differ about the same; and upon payment or tender of the amount of such compensation all such persons shall respectively deliver up to the promoters of the undertaking, or to the person appointed by them to take possession thereof, any such lands in their possession required for the purposes of the special Act."

(Sect. 122.) "If any party, having a greater interest than as tenant at will, claim compensations in respect of any unexpired term or interest under any lease or grant of any such lands, the promoters of the undertaking may require such party to produce the lease or grant in respect of which such claim shall be made, or the best evidence thereof in his power; and if, after demand made in writing by the promoters of the undertaking, such lease or grant or such best evidence thereof, be not produced within twenty-one days, the party so claiming compensation shall be considered as a tenant holding only from year to year, and be entitled to compensation accordingly."

The Lands Clauses Consolidation Acts Amendment Act, 1860 (23 & 24 Vict. c. 106) (20th August, 1860), recites that "it is expedient to extend the provisions of" the Clauses Act of 1845 in certain respects, "and to enable Her Majesty's Principal Secretary of State for the War Department to avail himself of the powers and provisions contained" in that Act for the purchase of lands wanted "for the defence of the realm"; and, by section 7, provides:— "For the purchase or acquisition of any messuages, lands, tenements, and hereditaments, wanted . . . for the defence of the realm, it shall be lawful" for the Secretary for War "to use all or any of the powers and provisions by the Lands Clauses Consolidation Act, 1845, . . . given to promoters of the undertaking, as therein mentioned; and for such purposes" the Secretary

for War "shall be deemed and taken to be the promoters of an undertaking within the meaning of the said Act . . . provided always that nothing herein contained shall authorise any purchase otherwise than by agreement of any lands, except according to the provisions of" 5 & 6 Vict. c. 94, sect. 23, "or prejudice or affect the powers and authorities of the said Principal Secretary for the time being under the said last mentioned statutes or either of them."

The Defence Act, 1860 (23 & 24 Vict. c. 112) in its preamble refers to the recommendations of a Royal Commission for the construction of certain works of defence for the protection of the Royal Arsenals and Dockyards, and the ports of Dover and Portland, "and of certain other works," recites that land would be required for the construction of such of these works as Parliament might provide money for constructing; and provides that, "on or before the 31st August, 1861, the lands required to be taken absolutely for the construction of the said works and depôt or Arsenal . . . shall be ascertained by a Declaration" to be made by the Principal Secretary for War; and that copies or plans should within three months thereafter be (*inter alia*) deposited with the parish clerk of the parish (if in England), and, in Ireland, with the clerk of the union; and, within a like period, notices in regard to such declaration should be posted on every church and public chapel in the parish or place in England, or in the usual places for posting public notices in the baronies, cities, towns, or boroughs in Ireland, wherein the lands comprised in such declaration respectively lie. Sect. 12—("Determination of amount of compensation otherwise than by agreement") enacts that, if for fourteen days after the service of any such notice as aforesaid any party on whom the same is served fail to state the particulars of his claim or to treat or agree, the amount of compensation "shall be settled by a jury in like manner as if the same were compensation for lands surveyed and marked out under" the Defence Act, 1842, as amended by the Ordnance Board Transfer Act, 1855. Section 13 provides that if the compensation claimed do not exceed £200 the same shall be settled by two Justices. Section 29 ("Power to use the Lands Clauses Consolidation Act, 1845,") provides that the said Secretary "may if he think fit as well in respect of lands required

Q. B. Div. 1899.

THE QUEEN v. JUSTICES OF CORK.

to be kept free from buildings as in respect of lands taken under this Act, use and avail himself of all or any of the powers and authorities" given by the Clauses Act, 1845, to "the promoters of the undertaking"; and, "every party enabled by the last mentioned Act to sell and convey or release lands or any estate or interest therein to the promoters of the undertaking, shall have the same or the like powers to contract and agree with the said Secretary of State as to the compensation to be paid in respect of any lands, estates or interests taken or affected under the provisions of this Act, provided always that nothing in this enactment shall prejudice or affect the right to exercise the other powers or authorities hereby given." Section 31 provides that "at any time after the expiration of fourteen days from the service of such notice as aforesaid, in relation to any lands mentioned in any such declaration as aforesaid as required to be taken by him" it shall be lawful for the said Secretary of State "to enter upon and take possession of and hold such lands or any of them, and to cause to be executed thereon all such works as" he may think fit, interest being meanwhile payable until payment of the compensation money. Section 46 ("Amendment of the Defence Act of 1842") recites and provides—"Whereas the Defence Act, 1842, has been amended by divers Acts, and it is expedient further to amend the same, the following provisions of this Act in relation to lands to be taken under this Act, shall be applicable where lands are surveyed and marked out under the Defence Act, 1842, as amended as aforesaid (that is to say) the provisions concerning the mode of serving notices on owners, lessees and occupiers, the provisions concerning the determination of the amount of compensation for lands otherwise than by agreement. . . ." Section 47 interprets "the expression two Justices" as meaning "two Justices assembled and acting together."

Denis B. Sullivan, Q.C., and *T. M. Healy*, for the respondent, argued, *first*, that the notice to treat was bad, inasmuch as, for any proceedings under the Clauses Act of 1845, a twenty-one days' notice was necessary; and that a fourteen days' notice

had no reference to anything except proceedings under the Defence Acts of 1842 and 1860. *Secondly*, they contended that the case of a tenancy from year to year on which a fair rent for a statutory term had been fixed by the Irish Land Commission was not within section 121 of the Clauses Act of 1845, such tenant not being a "person having no greater interest therein than a tenant for a year, or from year to year"; that this provision in the Clauses Act had reference only to tenancies at will, or determinable within a year on notice to quit, and could not be taken to include the new creation of the Land Law (Ireland) Act, 1881—an interest which in reality was a perpetual interest subject to revision of rent from time to time, and to the observance of certain statutory conditions: Land Law (Ireland) Act 1881, sections 8, 13;—that the character of the tenancy was wholly changed; and, even if, so far as concerned landlord and tenant, it still continued to be technically a tenancy from year to year, still it was not the quality in law of the claimants' estate in the lands, but his interest, and the value and duration of that interest, which afforded the test for the purposes of section 121. *Thirdly*, they argued that, by the adoption of a fourteen days' notice, the Secretary for War had elected to proceed, not under the Lands Clauses Act, 1845, but under the Defence Acts, 1842 and 1860, and was not thereafter at liberty to proceed under section 121 of the Clauses Act 1845; and further, that the 7th section of the Clauses Act, 1860, had been impliedly repealed by section 12 of the Defence Act of the same year, which enacted, in mandatory terms, that the amount of compensation "shall be" settled by a jury. The only mode (they submitted) of assessing compensation for lands taken was now in all cases by a jury, or by arbitration; and they asked accordingly that the Conditional Order should be discharged.

The Attorney-General (*The Right Hon. John Atkinson, Q.C.*), *Ronan, Q.C.*, and *Vesey Fitzgerald*, were heard for the applicant. They contended that the notice was sufficient: *Syers* v. *Metropolitan Board of Works* (1); that it was not necessary to insert in the

(1) 36 L. T. (N. S.) 277.

Q. B. Div. 1899.

THE QUEEN v. JUSTICES OF CORK.

notice any reference to any limit of time, fourteen days, or twenty-one days: it being only necessary, under the statutes, that, after the notice to treat had been served, the Secretary for War should, in the one case, allow a fortnight to elapse before proceeding, under the Act of 1842, to obtain possession of the lands, or, in the other case, three weeks, before proceeding under the Act of 1845. Both codes were available to the Secretary for War, and he had necessarily to have recourse to both, for various purposes, when any lands were being acquired for the defence of the realm. For the purpose, for instance, of obtaining immediate possession of the lands under a warrant of Justices (Defence Act, 1842, sect. 19), a fourteen days' notice was necessary, or a notice not to be acted upon until the expiration of fourteen days; and such warrant had been in fact here obtained. It would be a different matter had use been made of the Clauses Act, 1845, before the expiration of three weeks from the service of the notice; but, in the present instance, a much longer period had elapsed before any step was taken under section 121; and, besides, the letter of the 2nd May, 1898, was a waiver of the objection even if valid.

As to the second point, a tenant from year to year on whose holding "a fair rent for a statutory term" had been fixed, still continued none the less a tenant from year to year. "The statutory term" (see sect. 8 of the Land Act of 1881), does not refer to any new interest created in the tenant, or give him a tenure for fifteen years; the section does nothing more than provide that the "tenancy from year to year shall (*if it so long continues to subsist*) be *deemed* to be a tenancy subject to statutory conditions." The nature of the tenure is not altered; the tenant is subject to the conditions of his former tenancy, and to the further statutory conditions mentioned in section 5; the landlord's power to serve a notice to quit (save in certain cases), is gone, but the tenant still retains the power of surrender; and, at the end of the fifteen years, his position remains the same as it previously was. The "statutory term" is the period for which the *rent* is to continue unchanged; but the tenancy is not a tenancy for fifteen years, nor is it anywhere so described in the Act—being, both before the fair rent is fixed, and while it is so fixed, and after the statutory term has elapsed, a tenancy from year to year.

[Counsel cited *Reg.* (*Baxter*) v. *Great Northern Railway Company* (1); *Wright* v. *Tracey* (2); *Peyton* v. *Gilmartin* (3).]

In regard to the suggested repeal of sect. 7 of the Clauses Act, 1860, by section 12 of the Defence Act, passed eight days later in the same year—no instance of such a repeal by implication could be given; it was impossible to contend that section 12 of the later Act—an Act passed for certain particularized purposes, and only, so far as it became of general application, becoming so under section 46—could be held to repeal the whole effect of the incorporation of the Lands Clauses code under section 7 of the Clauses Act of 1860: see *Metropolitan District Railway Company* v. *Sharpe* (4). Section 29 of the Defence Act, 1860, showed, as was pointed out by Lord Justice Walker in *Reg.* (*Moore*) v. *Abbott* (5), that the powers conferred on the Secretary for War to use the Clauses Acts were cumulative powers, and did not in any way interfere with or cut down his powers under the Defence code, the two modes of procedure lying in altogether different planes. The whole course of legislation on this subject demonstrated that the most jealous care had throughout been used to prevent the possibility of any suggestion that the provisions of the Defence code were in any way modified by any merely enabling enactments by which the Secretary for War was permitted at his discretion to employ the procedure under the Lands Clauses Acts.

T. M. Healy, in reply.

Cur. adv. vult.

April 20.

SIR P. O'BRIEN, L.C.J.:—

The question in this case is one of very considerable importance in reference to the taking of lands for military purposes for the defence of the realm, under the Defence Acts. The question simply stated is this—Must the compensation for lands held under judicial tenancies for statutory terms, be assessed, in case of dispute as to value, by a jury; or has the Secretary of State for

(1) 2 Q. B. D. 151.
(2) Ir. R. 7 C. L. 134; Ir. R. 8 C. L. 478.
(3) 28 L. R. Ir. 378.
(4) 5 App. Cas. 425.
(5) [1897] 2 Ir. R. 362

Q. B. Div. 1899.

THE QUEEN v. JUSTICES OF CORK.

Sir P. O'Brien, L.C.J.

War at his option the alternative of having the value assessed before two Justices of the Peace, or to have the compensation assessed by arbitration?

The question arises in this way. The Secretary of State for War wanted for the purposes of the War Department certain lands in Bear Island, off the coast of Bantry. These lands were held under judicial tenancies, many years of which, I assume, are still unexpired. A dispute arose with reference to the amount of compensation that should be awarded. The War Department served summonses on the tenants to have the compensation assessed before two Justices; and, when the matter came on to be heard at Petty Sessions, Mr. Healy, solicitor for the tenants, insisted that the Justices had no jurisdiction to entertain the case—that the proper tribunal to assess compensation was a jury, and not Justices. The mere statement of the nature of controversy between the War Department and the tenants shows how very important it is; because the amount of compensation which might appear to a jury to be just, might be very different indeed from that which a bench of Justices might think it right to award. The Justices before whom the case came on for hearing were of opinion, yielding to Mr. Healy's contention, that they had no jurisdiction in the matter, and that the proper tribunal was a jury. Mr. Healy's objections before the Justices are stated in Mr. Towers' very clear and excellently drawn affidavit:—

"*First.* That the Justices had no jurisdiction in any of the cases, because sect. 19 of the Defence Act of 1842, which was the basis of their jurisdiction, required a jury; and sect. 7 of the Lands Clauses Consolidation Acts Amendment Act of 1860, under which (and the incorporated provisions of the Act of 1845) Justices had power to assess compensation in respect of lands in the possession of any person having no greater interest therein than as tenant from year to year, was impliedly repealed by sect. 12 of the Defence Act, 1860. *Secondly*, that the Justices had no jurisdiction to assess compensation in the case of Mary Sullivan, or in any case where a judicial rent has been fixed, because a judicial tenant had (as Mr. Healy alleged) a greater interest in the lands than a tenant from year to year within the meaning of the Lands Clauses Consolidation Act, 1845."

These were Mr. Healy's two main grounds of objection. He raised a third ground of objection as to the notice served in the particular case, which is of very subordinate importance.

Having considered the case very carefully since the conclusion of the arguments, I am of opinion that Mr. Healy's first point was wrong, but that his second was right.

As to his first point of objection, namely, that a jury was the only tribunal to assess compensation for lands taken by the War Department for military purposes, he relied upon the 12th section of the Defence Act of 1860 (23 & 24 Vict. c. 112, s. 12). That section provides that if the Secretary of State and such party, that is—any party upon whom notice to treat has been served—do not within fourteen days agree to the amount of compensation, such amount "shall be settled by a jury." Mr. Sullivan points to the words "shall be settled," and says they are mandatory. No doubt they are, if an alternative method of assessment is not adopted; and, even in the self-same Defence Act of 1860, there is a clear option given to the Secretary of State to avail himself of the powers of the Lands Clauses Consolidation Act of 1845, and the existence of the 29th section renders the legislation in this subject homogeneous.

The 7th section of the Lands Clauses Amendment Act of the self-same year (1860) had already enacted that if the provisions of the Lands Clauses Consolidation Act were used by the Secretary of State for War, they should be considered as incorporated with the Defence Act of 1842. The argument presented by Mr. Sullivan and Mr. Healy went to the length of contending that the 12th section of the Defence Act of 1860 impliedly repealed the 7th section of the Clauses Act of the self-same year, which was passed a few days before. This, in our opinon, is wholly untenable; and our view upon the subject is entirely borne out by Lord Justice Walker's opinion in the case of *Reg.* (*Moore*) v. *Abbott* (1). He says, "The Land Clauses Amendment Act of 1860 (23 & 24 Vict. c. 106) provides that for the purchase of any lands, &c., wanted for the service of the Admiralty or War Department or defence of the realm, the Secretary of State may use all the powers, &c., of the Lands Clauses Consolidation Act, 1845, as if contained in the 5 & 6 Vict. c. 94; and those powers are declared to be *cumulative*." The learned Lord Justice adds—"The Defence Act of 1860 is

(1) [1897] 2 Ir. R. p. 418.

Q. B. Div. 1899.

THE QUEEN v. JUSTICES OF CORK.

Sir P. O'Brien, L.C.J.

primarily directed to the acquisition of dockyards and arsenals in Dover and Portland; but section 46 contains some general provisions, including the determination of the amount of compensation for land taken otherwise than by agreement, and a jury is brought into requisition as in the 5 & 6 Vict. c. 94, save that the Secretary of State is read in. A cumulative power is given to use, as to lands taken under the Act, the provisions of the Lands Clauses Act of 1845." This is the cumulative power in the 29th section of the Defence Act of 1860 to which I have already referred. There is no doubt there is this cumulative power also in the Defence Act of 1842, by virtue of the 7th section of the Lands Clauses Amendment Act of 1860, which I have already quoted. Mr. Healy's first objection therefore fails. The cumulative power conferred by the 7th section of the Lands Clauses Act, 1860 (23 & 24 Vict. c. 106) cannot be held to be impliedly repealed by the 12th section of the Defence Act (c. 112) of the same year.

I now come to Mr. Healy's second ground of objection, namely, that compensation in regard to a judicial tenancy cannot be assessed under the 121st section of the Lands Clauses Act of 1845. I own I have changed my opinion as to this second ground of objection—my first impression having been that a "judicial tenancy," or "statutory term" was within the section, the true criterion being *quality*, not *quantum*, of interest. But on consideration, I think that the true test is *duration* of interest. At the same time I am not at all clear that there is not a difference in the *quality* of the tenure between an ordinary tenancy from year to year and a tenancy for a statutory term. The words of the 121st section are—"if any such lands shall be in the possession of any one having no greater interest therein than as tenant for a year or from year to year."

There is a case of *The Queen* v. *Great Northern Railway Company* (1), which I think is instructive. In that case there were certain tenants of land which they held for a term of two years. The defendant Railway Company took possession under the Lands Clauses Consolidation Act of 1845. At the time when possession was taken by the defendants, the unexpired residue of the tenants'

(1) 2 Q. B. D. 151.

term was less than one year; they commenced proceedings under sect. 68 of the Act to obtain compensation by arbitration; but it was held that the tenants were persons "having no greater interest . . . than as tenant for a year or from year to year" within the meaning of section 121; that they ought to have taken proceedings before Justices in order to determine the amount of compensation payable to them, and that they could not obtain compensation under section 68. Mr. Justice Lush, in giving judgment, said: "I do not feel any hesitation as to the proper construction of the statute. Applying the ordinary rules of interpretation to sect. 121, I cannot entertain the slightest doubt that it was intended to comprehend every species of interest, being less than a year in *duration*." "I think," he added, "that this is plainly indicated by the words 'having no greater interest therein than as tenant for a year or from year to year.'" The test adopted by Mr. Justice Lush was *duration*.

The case of *Wright* v. *Tracey* (1) tells us that a tenancy for a year certain is not a less interest than an ordinary tenancy from year to year—which, of course, was the class of tenancy from year to year referred to in the 121st section of the Act of 1845—there were no "judicial tenancies" in those days. Therefore, as between a tenancy for a year certain, and a tenancy from year to year, whilst the former was not less than the latter, the latter was not more than the former; but is a "judicial tenancy" more than the latter; is a "judicial tenancy" greater than a tenancy from year to year? My answer is that, adopting the test of *duration*, it is more; because it is in substance what is named in the Act of Parliament a "statutory term for fifteen years"—the length or continuance of the tenancy being fixed by an agency external to and independent of the landlord, namely, the Act of Parliament, its duration being assured by depriving the landlord of all power to serve a notice to quit. If the tenant renders himself liable to eviction, it is the Act of Parliament that is, as it were, the agency that evicts him. He is liable to eviction for breach of statutory conditions, but as long as he observes the statutory conditions he holds for the statutory term. So long as there is no breach of statutory conditions the tenant holds for the statutory term.

(1) Ir. R. 7 C. L. 134; Ir. R. 8 C. L. 478.

Q. B. Div. 1899.

THE QUEEN v. JUSTICES OF CORK.

Sir P. O'Brien, L.C.J.

My brother Johnson said in *Peyton* v. *Gilmartin* (1): "So long as the statutory term subsists it is for fifteen years (in the Act referred to as a statutory term), subject to the specified statutory conditions. If within the fifteen years it ceases to subsist, the statutory conditions, and what in the Act is referred to as a statutory term, ceases with it." In the case where that was said the majority of the Court held that a statutory term, created during the lifetime of a tenant for life, was co-existent *pro tanto* with his life, if he lived so long, that is to say, if the tenant for life lived for fifteen years, the statutory term, in the absence of breach of statutory conditions, would continue for the full term of fifteen years. My brother O'Brien held that it would even bind the estate of the remainderman. A passage in Lord Justice Holmes' judgment in that case has been referred to, in which he says:—"The legislation relative to the statutory term is based upon the continuance of a tenancy already existing, and does not involve the creation of a new tenure." I do not, however, think that the Lord Justice was there dealing with the question of *duration*, which, as I have said, is the test laid down by Mr. Justice Lush; but, at the same time, I must confess that I am not satisfied that the nature of the estate has not been changed, or perhaps I should say must not be deemed to be changed. In *Wright* v. *Tracey* (2), the Lord Chief Baron says:—"Upon the second question, I am of opinion that a tenancy for a year certain is not one less than a tenancy from year to year, within the meaning of the section. There appears to be little, if any, difference of opinion among the members of the Court, who have already given judgment upon this appeal, as to the nature of the tenancy from year to year. Lord Wensleydale, in *Oxley* v. *James* (3), accurately describes it as a lease for a year certain, with a growing interest during every year thereafter, springing out of the original contract, and parcel of it. By these words I understand Lord Wensleydale to mean, not that a tenant from year to year acquires at the inception of the tenancy an actual interest in the lands during every year thereafter, but that, when the new year has been entered upon, the estate for that year springs out of the original contract, and is a continuation of the old estate.

(1) 28 L. R. Ir. 378. (2) I. R. 8 C. L. p. 497. (3) 13 M. & W. p. 214.

The tenancy from year to year originally grew out of the tenancy at will . . . This limitation upon the power of determination, necessarily changed the nature of the estate, and, from a tenancy at will it became a term for one year certain."

Does then the imposition of a statutory term change the nature of a tenancy from year to year? One would be inclined to say that a considerably greater change is effected in the nature of a tenancy from year to year by the creation of a statutory term, than by the alteration of a tenancy at will into a tenancy from year to year. And this change is secured by external agency independent of the parties, by taking away from the landlord the power to serve a notice to quit. This must be admitted to be a change of the gravest importance. No doubt, a power of surrender continues in the tenant; and the tenure, under the new system, is most aptly called a "statutory term," and that statutory term, under the Act of 1881, can be aptly compared to a lease for fifteen years, with a power of surrender in the lessee, which shows how different it is from an ordinary tenancy from year to year.

I confess that my opinion fluctuated during the argument, but, upon consideration, I am persuaded that Mr. Healy is in the right. I do not think that a judicial tenancy comes within section 121; and therefore, upon this second point, Mary Sullivan's contention must prevail.

In reference to the third point, as to the validity of the notice to treat, it seems to me that the notice was sufficient. This is a very complicated code, and it is surprising that the War Department do not fall into more pitfalls than they do; I am sure that, if the greatest care were not exercised, and the greatest skill shown, it would be impossible to put the Defence Acts into operation. The main point, upon which our decision rests, is one of very great difficulty; I candidly say that I have changed my opinion on the matter; but, as to the notice, I think it is good enough; no proceedings were taken under it until after twenty-one days, and no question was raised by the tenant's solicitor in the correspondence.

Accordingly, upon the first point, I think there is an alternative procedure open to the War Department, one which it was

Q. B. Div. 1899.

THE QUEEN v. JUSTICES OF CORK.

of great importance to preserve, and that the Secretary for War was entitled to adopt it as a means of getting immediate possession. Upon the second question argued, the conditional order for a writ of mandamus must be discharged.

Gibson, J.

GIBSON, J. :—

The lands having been duly surveyed and marked out under the Defence Acts and the conditions prescribed by sect. 23 of the Defence Act, 1842, having been complied with, two Justices issued their warrant dated 4th November, 1898, commanding possession to be delivered to W. G. Towers, who is representative of the Secretary of State. This warrant is under sect. 19 of the Act of 1842.

A notice to treat dated the 7th March, 1898, was duly served on Mary Sullivan, who held part of the lands as judicial tenant from year to year, requiring her to comply with the terms of the notice within fourteen days. This notice, served on April 1st, was answered by her solicitor on May the 2nd. Mr. Towers subsequently procured a summons (the date of which is not stated, but it probably preceded the warrant for possession) returnable on the 4th November, to have the compensation payable ascertained under sect. 121 of the Lands Clauses Act, 1845. The summons was heard before four (not two) Justices, who declined to adjudicate on the ground of want of jurisdiction. The question raised upon this mandamus is whether they had jurisdiction. No objection has been raised with respect to the possible application of *Reg.* v. *Stone* (1), or whether, if applicable, that case ought to be followed, or in reference to the number of magistrates. I shall confine myself to the topics argued, which present some difficulty.

The first of these is, whether, assuming that sect. 121 may be applicable where a tenancy from year to year is sought to be expropriated by the Secretary of State, Mary Sullivan's holding is such a yearly tenancy as the statute contemplates. The section refers to a tenancy for a year or from year to year. According to Cockburn, C.J., the provision is introduced in favour of the tenant, and presumably to enable compensation to be cheaply and

(1) 7 B. & S. 769.

quickly assessed. Blackburn, J., says that the Legislature probably thought that tenancies within the section were too trifling to require compensation: *Reg.* v. *Stone* (2). The remark hardly fits a judicial tenant, enjoying what is commonly called, and what in substance is, fixity of tenure; and as leases, including freehold leases, may now be converted into judicial tenancies with the ordinary incidents attaching to lettings from year to year, the question whether sect. 121 extends to such judicial tenancies may be of extensive importance. It has been decided that such tenancies are in their legal quality under the Land Acts tenancies from year to year; but the point here is whether they fall within sect. 121.

The key of the section is found in the words "person having no greater interest than as tenant for a year," which throw light on the kind of yearly tenancy intended, on the principle *noscitur a sociis*. If a tenant for eighteen months unexpired is outside the section, why should a yearly tenant whose tenancy is not determinable by notice to quit be within it?

A yearly tenancy is for a year certain with a tacit renovation of the contract if the tenancy is not determined by notice to quit: *Right* v. *Darby* (2). It is a tenancy at will, but the will cannot be determined without legal notice. In its essence at Common Law it is not greater than a letting for a year, as it can be legally terminated at the end of a year by a notice served in time. The law on the subject is explained with his usual lucidity and precision by FitzGerald, B., in his well-known judgment in *Wright* v. *Tracey* (3). To such a yearly tenancy, not greater than a letting for a year certain, the section seems to apply.

Whether a tenancy not determinable without a statutory year's notice would be within it is a question not before us, and I abstain from suggesting any opinion upon it.

But does the section embrace a tenancy which it was not in the landlord's power to bring to an end? In *Weir* v. *Torney* (4) O'Hagan, J., held that a yearly tenant who, under the terms of his letting could not be dispossessed without an eight years'

(1) 7 B. & S. 769.
(2) 1 T. R. p. 162.
(3) Ir. R. 8 C. L. 478.
(4) 19 Ir. L. T. R. 41.

Q. B. Div. 1899.

THE QUEEN v. JUSTICES OF CORK.

Gibson, J.

notice to quit, came within the Act of 1881, and was entitled as yearly tenant to apply for a judicial rent. If an eight years' notice had been served, how in substance would the tenant's interest have differed from a term of eight years with a power of surrender in the tenant? Could sect. 121 apply to such a yearly tenant, or to one holding on the terms that notice to quit was not to be served so long as the tenant paid his rent and performed his obligations? See *Re King* (1) and *Kusel* v. *Watson* (2).

Under the Act of 1881, sect. 13, a notice to quit cannot be enforced against a judicial tenant who observes the statutory conditions. Such a tenant is entitled *toties quoties* to obtain renewals, and enjoys practically as against his landlord a quasi perpetuity during good behaviour. His interest is durable, and is certainly greater than for a year certain. If a lessee for two years unexpired, subject to clauses of re-entry for breach of covenants and with an unexercised power of surrender, would not be affected by sect. 121, which is clear,—why should the Court bring within its operation a tenancy, which, in value and permanence, closely approaches a fee, merely on the ground that in its legal character under the Land Acts it may be technically a tenancy from year to year? Such a tenancy could not with propriety be described as a tenancy at will, and does not belong to the ephemeral and valueless lettings which, according to Blackburn, J., were alone contemplated. The statutory conditions imposed by sect. 5 show that the nature of the old yearly tenancy, so far as the landlord's power to eject was concerned, was entirely changed. The rights so given by sect. 5 were in exchange for similar advantages which the landlord could have enforced if his power of serving notice to quit had been left unaltered.

This view is sufficient to decide the case, but as other questions important to the parties have been elaborately argued, and as the case may be considered elsewhere, I shall not leave them unnoticed.

Assuming that sect. 121 might, if applicable, extend to the case of a judicial tenant, does the section at all apply to expropriation by the War Department? Counsel for the tenant say

(1) L. R. 16 Eq. 521. (2) 11 Ch. Div. 129.

that it cannot, as they insist that the Defence Act of 1860, sect. 12 (which by force of sect. 46 is of general operation) expressly prescribes a jury as the only tribunal for assessing compensation. If they be right, the provisions as to arbitration in lieu of a jury at the owner's option are excluded from any application of the Act of 1845 which the Secretary of State is empowered to make under sect. 7 of the Act of 1860 (23 & 24 Vict. c. 106). The Attorney-General, on the other hand, contends that the procedure under the Defence Acts, and that under the Lands Clauses Acts (of which the Act of 1860, 23 & 24 Vict. c. 106, is one) are parallel and distinct, though the Secretary of State may in a manner dovetail them together; that section 121 is part of the expropriation machinery available under sect. 7; and that sect. 12 of the Defence Amendment Act of 1860 is merely an amendment of the Defence Code, which leaves the powers given by sect. 7 untouched. It is certainly hard to suppose that within the week between the 20th and 28th August, 1860, the Legislature decided to reduce or qualify the express powers given by sect. 7.

The solution of the problem depends upon two points: what is the *prima facie* construction of sect. 7, and what is the effect of sect. 12?

Sect. 7 of the Act of 1860 (23 & 24 Vict. c. 106) enables all or any of the powers and provisions by the Act of 1845 given to promoters to be used. The only qualification is that the conditions imposed by sect. 23 of the Defence Act, 1842, must be satisfied. I cannot doubt that the Secretary of State may, under these sweeping and comprehensive terms, use, if he sees fit, the provisions relating to assessment of compensation, including those prescribing the tribunal. These are part of the ordinary machinery for compulsory acquisition of land. Under sect. 19 of the Defence Act, 1842, after a jury was summoned by the sheriff, his functions were at an end, and the inquiry was held before Justices, &c., who were to preside, summon and swear witnesses, &c. The Act of 1845, on the contrary, made the sheriff presiding officer, but there was the alternative of arbitration if the party interested so desired. It seems obvious that the War Department could have compensation ascertained by a sheriff and a jury under the Act of 1845, and is not confined to the tribunal created by the Defence Act. If this

Q. B. Div. 1899.

THE QUEEN v. JUSTICES OF CORK.

Gibson, J.

be so, the right of arbitration under the same statute necessarily follows. Why should the provisions as to Justices be excluded? I can see no reason why small sums and small tenancies should not be dealt with by them.

Taking the *prima facie* construction of sect. 7 to be that the clauses of the Act of 1845 as to juries, arbitration, and Justices, may be applied,—does sect. 12 of the Defence Amendment Act of 1860 alter this?

The Defence Amendment Act of 1860 is a special Act, and it is only by sect. 46 that any of the sections become of general application. That section purports to engraft certain provisions contained in the earlier sections upon the Defence Act of 1842 and amending statutes. Does the discretionary power, given by 23 & 24 Vict. c. 106, sect. 7, make sect. 7 a Defence Act, which is to be treated as one of those amended by sect. 46? Without relying on the Interpretation Act, or the Short Titles Act, I think that sect. 46 is limited to the Defence Code proper, and does not curtail or affect the operation of 23 & 24 Vict. c. 106, sect. 7, passed the week before. This is the view taken by Walker, L. J., in *Reg.* (*Moore*) v. *Abbott* (1). He refers to the Barracks Act, 1890, sect. 4, which strongly supports this construction. Under that section, "Where land is acquired under the Defence Act and the Acts amending the same, the compensation to be paid for the land may, *if both parties agree*, be settled by arbitration instead of by reference to a jury." The Defence Act and amending Acts here can hardly include the Act of 1860 (23 & 24 Vict. c. 106, sect. 7), as the use of the Lands Clauses Act, 1845, under that section, would have conferred on the party interested the right to arbitration, whether the acquiring authority assented or not. To require an agreement by both parties, where one party might have the right without any agreement, is not intelligible.

Other considerations founded on the Act of 1860 (23 & 24 Vict. c. 112) point to the same result, viz. that the operation of sect. 7 is not cut down or affected. The provisions of sect. 9 as to service of notices are substantially the same as those in the Act of 1845, and can only be regarded as amendments of the Defence Code proper.

(1) [1897] 2 Ir. R. p. 420.

The jury spoken of in sect. 12 of 23 & 24 Vict. c. 112 must be a Defence Act jury under the Act of 1842, presided over by Justices, &c., and not by the sheriff, who is the acting officer under the Lands Clauses Act of 1845.

Section 12 is throughout an amendment of section 19 of the Act of 1842, and (it is suggested) was introduced to obviate the difficulties suggested by *Re Laws* (1). Again, section 29 (which, though not made general, is relevant for the purpose of interpretation) appears to confer analogous powers to those bestowed by section 7 of the earlier Act. They are cumulative, just like those given by the Military Lands Act, 1892, section 22.

Two arguments have been urged against the above construction with the view to establish that the fair result of the legislation was to make a jury the exclusive tribunal for settling compensation. The first of these is that section 13 (which gives Justices jurisdiction in claims up to £200) is incompatible with the limit of £50 found in the Act of 1845; and that, if the Act of 1845 is to be deemed as amended in this respect by substituting £200 for £50, it must on the same principle be held to be amended by section 12, with the result that arbitration and summary jurisdiction under section 121 are struck out. The answer to this seems to be that section 13 only applies so far as the Defence Acts are employed. The Secretary of State may (and would usually) go under section 13, but he could, if he thought fit, proceed under the Act of 1845 only—in which case £50 and not £200 would be the limit. There is no provision in the Defence Act, 1842, at all giving Justices jurisdiction. Section 13 creates a new jurisdiction and does not amend an old one. Nor am I quite satisfied that, even if section 13 was construed to amend section 22 of the Act of 1845, such construction necessarily imports that section 12 is to be accepted also as amending the Act of 1845 as to arbitration and jurisdiction under section 121.

The other argument is that the Barracks Act, 1890, The Rifle Ranges Act, 1891, etc., introduce arbitration as a substitute for trial by jury without referring to assessment before Justices, and that the inference results that a jury is treated as the only then

(1) 1 Exch. 441.

Q. B. Div. 1899.

THE QUEEN v. JUSTICES OF CORK.

Gibson, J.

available means of settling disputed compensation. I cannot follow this. Under the Act of 1845 the jurisdiction of Justices, where it applied, was exclusive; and arbitration at owner's option was allowed as an alternative to a jury only. The object of the legislation was, at the election of the acquiring authority, to replace a jury by arbitration, but not to affect the previous exclusive jurisdiction of Justices in cases where, under the Act of 1845, it applied.

I am therefore of opinion that the Secretary of State can bring into operation and use section 121 in cases properly coming within it. This seems a necessary deduction from the reasoning of Walker, L.J., in *Reg.* (*Moore*) v. *Abbott* (1). If arbitration was possible under section 7, it appears to follow that section 121 might equally be applied. I arrive at this conclusion unwillingly, as the tribunal is not a satisfactory one to dispose of what may be substantial interests. If the section restricts the number of Justices to two, there may be a deadlock if they disagree; while, if the number is not restricted, a confluence of Justices flocking in from all parts of a district may be far from an ideal valuation Court in a business point of view.

The last point discussed was that the notice, which fixes fourteen days for the tenant's reply, was not a legal notice under the Act of 1845, which allows a period of twenty-one days for the purpose. The statute, however, prescribes no particular form of notice, and only attaches certain consequences if the party fails for twenty-one days to meet the notice. Here the notice, though it required action by the tenant in fourteen days, was not attempted to be enforced for upwards of a month, and the answer made to it by the tenant's solicitor is manifestly a waiver. The notice, in clause 6, plainly indicated an intention to proceed under section 121.

The difficulty that the notice has suggested to my mind is not quite that put in argument. The election to use all or any of the powers, etc., of the Act of 1845 binds the Secretary of State to the extent of his election. *Pari ratione*, I think that, if he has elected to use the provisions of the Defence Code, to the extent of his election he may be precluded from afterwards putting in force the

(1) [1897] 2 Ir. R. 362.

Act of 1845, if and so far as the same is inconsistent with what he has done or elected to do under the Act of 1842. As no such question, however, has been raised or discussed at the Bar, I have not felt it desirable to consider whether, so far as regards what has been done, there is any incompatibility or conflict between the portions of procedure used and adopted from the two respective codes.

Upon the first point argued I am of opinion that Mary Sullivan, as a judicial tenant, is outside section 121, and that the mandamus must be refused on that ground.

O'BRIEN, J. :—

The question in this case is as to the proper tribunal to assess compensation for lands required for military purposes, held under a statutory term; and this depends upon several statutes, some of them concurrent if not conflicting, upon the same kind of subject, and pursuing two distinct lines of legislation, which at points appear to go in upon each other, relating to the acquisition of lands for the purpose of national defence, and for public or commercial undertakings. Proceedings were taken before Justices, and they decided that they had no jurisdiction. From this an application for a mandamus has resulted; and cause has been shown against the order. The leading statute on the subject is the Defence Act of 1842, which provided for the assessment of compensation in all cases by means of a jury, with an appeal to the Court of Exchequer, the means of giving effect to which in the altered constitution of the Superior Courts may be dismissed for the present. That statute comprised, in general terms, lands of whatever tenure. The first of many modifications which it underwent was contained in the Lands Clauses Act of 1845, section 121 of which enacted that in the case of persons having no greater interest than as tenant for a year or from year to year, the amount of the compensation should be determined by two Justices. Under that section the proceeding we have to deal with has been taken, and the question is whether it is right: in other words whether land formerly held from year to year and now under a statutory term, comes within it. It will be observed that the words are not, a person "holding from year to year," but "having no greater interest

Q. B. Div. 1899.
THE QUEEN v. JUSTICES OF CORK.
O'Brien, J.

therein, than as tenant . . . from year to year," a distinction that has perhaps some effect as a clue to the intention of the Legislature, and indicating a measure of the value of the property, which indeed is necessarily the ground of the provision. It was contended for the tenant of the land that the word "interest" alone possessed the sense of *value*. But it is impossible to give that meaning to the term. "Estate or interest" are common words of conveyancing, and merely denote the quantity of estate, or nature of the right in property, and cannot be held to enlarge the tenancy from year to year. For other purposes it might perhaps be contended with success that a tenancy from year to year to which statutory conditions are attached has not lost its original character of estate. The Land Act of 1881 does not furnish any other description of it; and in certain contingencies it may return to its former condition. However, the question is not as to whether land held under a statutory term can properly be described as held under no greater estate than a tenancy from year to year, but whether it is at present a subject-matter to which the section can be applied. For what is the thing that, under the terms of the statute, is the subject of compensation? The value of the unexpired term or interest in such lands? In the case of a tenancy from year to year the unexpired term is the time that must elapse before a notice to quit served by the landlord can take effect. There is no such space or measure of duration of time now in existence as to a statutory term. If by any strain the statute could be applied to such a term, the compensation would be for what remains of the period of fifteen years, with the potential renewal of the same period for ever. The tenancy from year to year, as to what the Act determines to be the basis of compensation, is changed into a perpetuity, so that a literal impossibility of carrying it out coincides with the manifest intention of the law to make provision for the cheap and summary adjudication on the value of small and precarious interests.

I am therefore of opinion that the section does not apply to a statutory term, even if the provisions of the Lands Clauses Act of 1845 apply at all even to an ordinary tenancy from year to year, having regard to the express provision contained in the subsequent Statute of 1860 for settlement of the compensation by Justices

solely in the case where the amount of the claim does not exceed the sum of £200. I am of opinion, therefore, that the tribunal was not the legal one, and therefore that good cause is shown against the mandamus.

That is sufficient to determine the result of the motion, but having decided what is the wrong tribunal, it is perhaps not reasonable to leave the case without some expression of opinion as to how far the question, as to what is the right one, may be affected by some of the arguments that were addressed to us. For it was contended strongly that the Act, 23 & 24 Vict. c. 106, sect. 7, had the effect of introducing, into all cases concerning lands required for military purposes, the machinery of the Lands Clauses Act of 1845, and was to be taken as amending to that extent the Defence Act of 1842. The statute is called "An Act to amend the Lands Clauses Consolidation Act 1845," in certain other respects not material, and "to enable Her Majesty's Principal Secretary of State for the War Department to avail himself of the powers and provisions contained in the same Act." In accordance with the object so stated, it enacts in sect. 7 that for the purchase or acquisition of any lands for the defence of the realm, it shall be lawful for the Secretary of State for the War Department to use all the powers and provisions of the Lands Clauses Act, 1845, as if they were contained in the Defence Act of 1842, with a provision that nothing therein contained shall authorize the taking of any lands otherwise than by agreement, except in compliance with the 23rd sect. of that Act—the section requiring a previous certificate or warrant, unless in case of actual invasion—or should prejudice or affect the powers and authorities of the Secretary of State under the Defence Acts. These words certainly are large enough to embrace the whole machinery of the Act of 1845, and to apply it to the case of lands required for military purposes. But it is impossible either to suppose that that was their extent or meaning, or that it was not intended to amend the provision by the Act passed in the same session (chapter 112), which is specially called "An Act to make better provision for acquiring lands for the defence of the realm," and which re-asserts in the most absolute manner the mode of determining compensation contained in the Defence Act of 1842, taking no notice whatever of the means

Q. B. Div. 1899.

THE QUEEN v. JUSTICES OF CORK.

O'Brien, J.

for that purpose supposed to be introduced by the Act passed only a few days before. For in sect. 10, which is headed "Determination of amount of compensation by agreement," it says, in the most general terms, that the amount shall be determined by agreement between the Secretary for War and the parties having an estate or interest in the lands; and in sect. 12, which is headed "Determination of amount of compensation otherwise than by agreement," it provides that, in case of neglect to treat, or if the parties do not agree, the amount shall be settled by a jury in like manner as if the same were compensation for lands surveyed and marked out under the Defence Act of 1842, as amended by the 19th and 20th of Victoria—the Statute transferring the authority to the Ordnance Department. Then sect. 13 goes on to provide for claims not exceeding £200 being settled by Justices as already stated. These enactments are contained in a statute specially relating to certain works at Dover, but they are applied to all cases by sect. 46, which says that, "whereas the Defence Act of 1842 has been amended by divers Acts, and it is expedient further to amend the same, the following provisions in relation to lands to be taken under this Act shall be applicable where lands are surveyed and marked out under the Defence Act, 1842," as amended as aforesaid, and it includes in the enumeration "the provision concerning the determination of the amount of compensation for lands otherwise than by agreement." This last section was declared by the Court of Appeal in *Reg.* (*Moore*) v. *Abbott* (1) to be general in its operation. Nothing apparently can be more certain, positive, and clear, than that under it a jury is the tribunal to settle the compensation as to sums exceeding £200, and that any contrary enactment, if it existed, is repealed. For it cannot be contended that under the effect of the Act, 23 & 24 Vict. c. 106, sect. 7, two separate and concurrent codes exist, and that one of them relates to proceedings taken wholly under the Lands Clauses Acts, and another under the peremptory powers of interference with property authorized by the Defence Act of 1842; for sect. 7, which is alleged to incorporate the whole machinery of the Lands Clauses system, is expressly made subject

(1) [1897] 2 Ir. R. 362.

to the clause of the Ordnance Transfer Act requiring the certificate, and the certificate is only applicable in the case where lands are surveyed and marked out under the Act of 1842. It is possible that a subject may be found to satisfy the operation of sect. 7 in the proceedings under the Lands Clauses Act, where there is a notice to treat, or where the parties agree, without coming into conflict with the later statute. There is another enactment which may be referred to as showing the tendency in legislation to keep the system provided by the Defence Acts distinct from the law of compensation as to private undertakings, namely, the Statute of 1854, which supplies a defect in the Defence Act of 1842, by directing the same mode of compensation as to rights of common, which could not be necessary, if at that date at least the provisions of the Lands Clauses Act could be used for the same purpose. The last Statute that requires to be noticed is the Act of 1891, which is repealed as to all but sect. 11; and that section itself repeals sect. 4 of the Barracks Act of 1890, under which compensation for lands under the Defence Act, if the parties agreed, could be settled by arbitration instead of by a jury, and in lieu thereof gives power to the party acquiring the lands to require the compensation to be settled by arbitration instead of by a jury; and such a right therefore appears now to exist.

I have come to the conclusion also, with some regret, that the Court cannot give costs against the Crown (1).

Solicitor for respondent: *M. Healy.*

Solicitor for applicant: *The Chief Crown Solicitor.*

A. E. R. J.

The Court suggested, however, that the Crown should act as in *Fletcher Moore's Case*, and defray the respondent's costs.

Q. B. Div. 1899.

CRAIG *v.* M'CULLAGH AND BAIRD (1).

Nov. 11.

Practice—Ejectment for non-payment of rent—Execution—Sect. 12 *of Land Law* (*Ireland*) *Act*, 1896—*Portion of holding in hands of immediate landlord.*

A caretaker's notice under sect. 7 of the Land Law (Ireland) Act, 1887, is the proper method of execution of a judgment in ejectment for non-payment of rent against "an immediate landlord" who retains portion of a holding in his own hands, but has let the remainder to under-tenants, entitled to retain possession as immediate tenants to the head landlord under sect. 12 of the Land Law (Ireland) Act, 1896.

In default of appearance by the defendants the plaintiff on the 21st July, 1899, entered up judgment in ejectment for non-payment of rent in respect of the lands of Craigboy, in the county of Down, containing 100 acres Cunningham, held by the defendants at the yearly rent of £88 12*s.* 6*d.* The defendants had sub-let portion of the holding, viz. 64 acres in three sub-tenancies, to Isabella Angus, William Mawhinny, and James M'Aulay, respectively. The plaintiff admitted that the under-tenants were entitled under section 12, Land Law (Ireland) Act, 1896, being persons in occupation as tenants otherwise than as immediate tenants to the plaintiff of portion of the lands, to retain possession as immediate tenants to the plaintiff of the portions occupied by them, and not to have the judgment executed against them. The judgment exempted these 64 acres from execution in pursuance of section 12, Land Law (Ireland) Act, 1896. The plaintiff on November 6, 1899, sought to issue execution in respect of the 36 acres in the hands of the defendants, which was refused in the office, the Master making the following note of his reasons for the information of the Court:—

"Having regard to what I have been given to understand is the opinion of the Judges, viz. that section 7 of the Act of

(1) Before O'Brien, Johnson, Boyd, and Kenny, JJ.

1887 does not apply to such a case, but that execution should not issue for six months from the date of the judgment, I refer the matter to the Court, refusing to issue execution."

Chambers, for the plaintiff, moved for leave to issue a *habere*.

BOYD, J., sitting at Chambers, referred the matter to the full Court.

Chambers renewed his application before the full Court :—

If section 7 Land Law (Ireland) Act, 1887, does not apply to the balance of the lands in the defendants' possession, the plaintiff is entitled to issue a *habere* at once. If the Court decides that it does apply the plaintiff is willing to serve caretaker's notice under that section

THE COURT made the following order :—

> THE COURT, being of opinion that said 7th section of the Land Law (Ireland) Act, 1887, does apply to the judgment in this action, and that said judgment is without prejudice to the rights of the sub-tenants therein mentioned, is pleased to make no rule on the plaintiff's said motion.

Solicitor for the plaintiff: *Charles C. Craig*.

J. L.

Q. B. Div. 1899. May 10, 18.

VISCOUNT MASSEREENE AND FERRARD, APPELLANT; THE COMMISSIONERS OF INLAND REVENUE, RESPONDENTS (1).

Appointment of new trustees of a settlement—Sale of lands included in the settlement—Reinvestment of the proceeds in stock—Ad valorem *duty as on a settlement—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39).

A portion of certain lands, subject to the trusts of a marriage settlement executed in 1870, was, in exercise of a power contained in the settlement, sold and the proceeds invested in the purchase of stock:—

Held, that a deed appointing a new trustee of the settlement, and vesting in the new and continuing trustee the property, subject to the trusts of the settlement, including therein the stock above mentioned, is not a settlement within the meaning of the definition of the word "settlement" in the schedule to the Stamp Act, 1891.

CASE stated by the Commissioners of Inland Revenue, pursuant to the 13th section of the Stamp Act, 1891 (54 & 55 Vict. c. 39) as follows:—

1. On the 20th day of May, 1898, an instrument (2) was presented on behalf of Viscount Massereene and Ferrard (hereinafter called the appellant) by Messrs. Richardson and Synnott, his solicitors, to the Commissioners of Inland Revenue, under the provisions of the 12th section of the "Stamp Act, 1891" (54 & 55 Vict. c. 39), for the opinion of the Commissioners as to the stamp duty with which the instrument was chargeable.

2. The instrument is made between the appellant and the Viscountess Massereene and Ferrard, his wife, of the first part; John Staples Alexander (a trustee of "the Settlement") of the second part, and Major-General Hugh M'Calmont (a proposed new trustee of the third part; and is supplemental to an indenture (therein and hereinafter called "the Settlement," dated 3rd October, 1870 (being a settlement made previously to the marriage of the appellant), and also supplemental to another indenture

(1) Before PALLES, C.B., and GIBSON and MADDEN, JJ.

(2) A copy of the deed was annexed to the case, but it is unnecessary for this report to set it out *in extenso*. It bore date 5th April, 1898.

dated 11th July, 1887, being amongst other things an appointment of new trustees of "the settlement."

3. By "the settlement" certain lands which were subject to the incumbrances set out in the schedules thereto were specifically settled and conveyed to the trustees therein named, with power to them to sell or exchange the same, and in the said settlement is contained a declaration that the trustees or trustee should with all convenient speed invest all moneys payable upon any such sale or exchange in the purchase of other lands to be settled or assured upon the uses or trusts therein mentioned.

4. The settlement contains the following provision amongst others:—"Provided always, and it is hereby agreed and declared that it shall be lawful for the said trustees or trustee for the time being, upon the request of the said Clotworthy John Viscount Massereene and Ferrard (the appellant) during his life, and after his death at their or his discretion, to apply any money to arise by any such sale or exchange as aforesaid, in or towards paying off or discharging any or any part of the mortgages, charges, or incumbrances specified in either of the said schedules hereunder written, or which shall be created under any power in that behalf herein contained, and for the time being affecting all or any of the hereditaments then subject to the subsisting uses or trusts of these presents; but without altering the equities or obligations of the parties claiming under these presents, as to defraying the fines or expenses of such leases or grants as aforesaid. And it is hereby agreed and declared that until the money to arise by such sale or exchange as aforesaid shall be disposed of as hereinbefore directed the said trustees or trustee for the time being, with the consent of the said Clotworthy John Viscount Massereene and Ferrard, during his life, and after his death at the discretion of them or him, the said trustees or trustee may invest the same or any part thereof in their or his names or name, in or upon any of the public stocks or funds, or Government securities of the United Kingdom, or upon real securities in England, Wales, or Ireland, and may vary such stocks, funds, and securities. And it is hereby agreed and declared that the dividends, interest, and income of such stocks, funds, and securities shall be paid and applied to such person or persons for such purposes, and in such

Q. B. Div. 1899.

MASSEREENE, *Appellant;* COMMRS. IN. REVENUE, *Respondents.*

manner as the rents and profits of the hereditaments to be purchased therewith, as aforesaid, would be payable or applicable in case such purchase and settlement as aforesaid were then actually made."

5. The instrument recites that divers parts of the premises comprised in "the settlement" had from time to time been sold, that the short particulars of such sales are contained in the 4th schedule to such instrument, and that divers moneys arising from said sales had been from time to time applied in part discharge of incumbrances affecting said premises, and that other moneys arising from said sales had been invested in divers stocks, and that the short particulars of the several applications, or payments and investments respectively so made are set forth in the fifth schedule thereto. The instrument further recites the death of James Keith Fraser, one of the trustees of "the settlement," and that the appellant and Viscountess Massereene were desirous of appointing the said Hugh M'Calmont a trustee of "the settlement" in place of the said James Keith Fraser, and that the respective investments particularised in part 2 of the fifth schedule were intended to be forthwith transferred into the joint names of said John Staples Alexander and Hugh M'Calmont. It is admitted that the value of the investments particularised in the second part of the 5th schedule, based upon the average prices at the date of the instrument was £3518.

6. By the operative part of the instrument "the appellant" and the Viscountess Massereene appointed Hugh M'Calmont a trustee of "the settlement," and they declared that all the estates and interest of the said John Staples Alexander as surviving trustee of "the settlement" should respectively forthwith vest in the said John Staples Alexander and Hugh M'Calmont as trustees of "the settlement" as joint tenants upon the trusts and subject to the powers and provisions applicable thereto respectively by virtue of "the settlement" or otherwise: and it was further agreed and declared that the said John Staples Alexander and Hugh M'Calmont should hold the said stocks mentioned in the second part of the 5th schedule thereto, upon the trusts and subject to the powers and provisions applicable thereto respectively by virtue of "the settlement" or otherwise.

7. There has not been any previous instrument upon which *ad valorem* settlement duty has been paid in respect of the amount or value of the proceeds of the sale of the real estate as represented by the stocks and securities set out in the said second part of the 5th schedule to the instrument, and the Commissioners were of opinion that the instrument was chargeable under the head "settlement" in the 1st schedule to the Stamp Act, 1891, in respect of the value of the said stocks and securities specified in part 2 of the 5th schedule to the instrument.

8. The Commissioners therefore assessed the instrument as chargeable with the stamp duty of £9 being the *ad valorem* duty under the head of "settlement" in the schedule to the Stamp Act, 1891, at the rate of 5*s.* for every £100 and fractional part of £100 of the said sum of £3518 mentioned in paragraph 5 of of this case, and also with the further stamp duty of 10*s.* as an "appointment of a new trustee" under that head in the said schedule, and with the further stamp duty of 10*s.* under the head "conveyance or transfer of any kind not hereinbefore described" in the said schedule in respect of the vesting declaration contained in the instrument.

9. When the instrument was presented to the Commissioners for their opinion as to the stamp duty payable thereon, it bore a £1 stamp, and the further duty of £9 so assessed as aforesaid was thereafter paid to the Commissioners together with the penalty of £10 then payable on stamping the instrument with such last-mentioned additional duty, and it was stamped accordingly, and also with the particular stamp referred to in section 12 (4) of the Stamp Act, 1891, denoting that it was duly stamped.

10. The appellant does not raise any question as to the correctness of the assessment so far as it relates to the two duties of 10*s.* each; but is dissatisfied with the assessment of *ad valorem* duty and contends that such duty is not payable.

11. The appellant has therefore in pursuance of the 13th section of the Stamp Act, 1891, required the Commissioners to state and sign a case setting forth the questions on which their opinion was required, and the assessment made by them: and the Commissioners do hereby state and sign a case accordingly.

The questions for the opinion of the Court were:—

Q. B. Div. 1899. MASSEREENE, *Appellant*; COMMRS. IN. REVENUE, *Respondents*.

(1.) Whether the instrument is chargeable with the *ad valorem* duty of £9 in accordance with the assessment of the Commissioners?

(2.) If not, whether it is chargeable with any duty in addition to the two duties of 10*s.* each?

Brady (with him *Price*, *Q.C.*) for Lord Massereene:—

We admit our liability to pay the two 10*s.* stamps, the 10*s.* stamp under sect. 62 of the Stamp Act, 1891, on the transfer of the property, and the 10*s.* stamp on the appointment of new trustees. The only question is, whether the deed in question is liable to an *ad valorem* duty in addition, as a duty on a settlement. It is not a settlement. No new property is brought into the trusts of the marriage settlement. The subject ought not to be taxed without clear words: *Attorney-General* v. *Beech* (1); *Re Micklethwait* (2). There are no clear words in the present case, no words to impose such a duty. [He referred to the definition of "settlement" given in the schedule to the Stamp Act, 1891].

Matheson, *Q.C.*, and *Charles MacDermot*, for the Commissioners of Inland Revenue:—

As regards the term "settlement," and its definition, the test is—is there an earlier instrument that can be taxed? The shares in which the property is now invested were never dealt with by any instrument before this. The effect of sect. 62 of the Stamp Act of 1891 is shown by *Hadgett* v. *Inland Revenue Commissioners* (3). We say that property is not settled within the meaning of the Act until it is dealt with by an instrument. Further, the property sought to be charged is not the same property, for two reasons:—1, The property was taken out of settlement, power being given to the trustees to release the portion sold from the trusts of the settlement; 2, the property now is personal property. The deed comes within the meaning of the word "settlement," as defined in the schedule to the Stamp Act. By sect. 4 of the Stamp Act an instrument relating to several matters

(1) [1899] A. C. 53. (2) 11 Ex. 452. (3) 3 Ex. D. 46.

is to be separately charged. This deed is a conveyance and a settlement. [They referred to *Stucley's Settlement* (1); *The Commissioners of Inland Revenue* v. *Angus* (2); *Nagle & Hollis* v. *Ahern* (3)].

Price, Q.C., in reply:—

A settlement requires a person who has power to settle. Here there is no settlor. The recitals of the instrument show that the land was settled. The land has been sold, but the trusts require the proceeds to be invested in land. The deed of 1870 declared the trusts: *Hadgett* v. *The Inland Revenue Commissioners* (4), merely decided that there must be a stamp on the vesting declaration or order. As to Stucley's case, it is not applicable. It was a case of articles of agreement to settle.

Cur. adv. vult.

May 18.

PALLES, C.B.:—

The question for decision here is whether an instrument, dated the 5th of April, 1898, is a "settlement" within the meaning of the Stamp Act, 1891, and as such liable to an *ad valorem* duty at the rate of 5*s.* per cent. on the amount of the moneys, stocks, or securities comprised therein. The definition of a "settlement" in the schedule to that Act is, "Any instrument, whether voluntary, or upon any good or valuable consideration, other than a *bonâ fide* pecuniary consideration, whereby any definite and certain principal sum of money (whether charged or chargeable on lands or other hereditaments . . . or not, or to be laid out in the purchase of lands or other hereditaments or not), or any definite and certain amount of stock, or any security, is *settled or agreed to be settled in any manner whatsoever.*"

The sums of money we have to deal with, and the stocks into which they have been converted, are definite and certain.

Our inquiry, therefore, is whether they are, by this instrument, "settled or agreed to be settled in any manner whatsover."

The instrument is an indenture made between Viscount and Viscountess Massereene, of the first part, John Staples Alexander,

(1) L. R. 5 Ex. 85.
(2) 23 Q. B. D. 579.
(3) 3 Ir. L. R. at p. 45.
(4) 3 Ex. D. 46.

Q. B. Div. 1899.

MASSEREENE, *Appellant*; COMMRS. INL. REVENUE, *Respondents*.

Palles, C.B.

of the second part, and Major-General Hugh M'Calmont, of the third part. It is expressed to be supplemental to two previous deeds, one of which bears date the 3rd October, 1870, and was a settlement upon the marriage of Lord and Lady Massereene; and the other of which is dated the 11th July, 1887, and was a deed whereby John Staples Alexander was appointed a trustee of the settlement in place of one of the former trustees, who had died; and whereby the property subject to the trusts was vested in John Keith Fraser, the continuing, and the said John Staples Alexander, the new, trustee upon the trusts of the settlement.

The property comprised in the settlement of 3rd October, 1870, consisted exclusively of lands, which were subject to incumbrances. By that settlement the lands were conveyed to trustees upon trusts unnecessary to be stated, further than that under them Lord and Lady Massereene took limited interests, and that it contained the usual power to the trustees to sell and exchange any part of the lands, and a declaration that the moneys arising from any sale or exchange should be invested in the purchase of other lands, which were to be settled upon the same trusts. The settlement also contained a power to the trustees, with the consent of Lord Massereene during his life, to apply the moneys arising from such sale or exchange to paying off any of the incumbrances; and to invest the same, pending an investment, "in or upon any of the public stocks or funds or Government securities of the United Kingdom, or upon real securities in England, Wales or Ireland."

The instrument of the 5th April, 1898, the duty on which is in question, recites that some of the lands comprised in the settlement had from time to time been sold, that parts of the sale moneys had been from time to time applied in part discharge of incumbrances, and that other parts of those moneys had been invested in certain stocks, which were particularized in the 5th schedule to the deed. This schedule is divided into two parts. The first shows payments to the amount of £1500 8*s*. 3*d*. on foot of incumbrances, which affected the settled lands.

As the Inland Revenue do not seek *ad valorem* duty upon those sums it is unnecessary that I should refer to them particularly. The second part of the schedule shows the investments of the residue of the proceeds of the sales. It consists of two items: 1,

seventy-six £10 shares of the Ballymena and Larne Railway Company, which were converted into £288 stock of the Belfast and Northern Counties Railway, which is stated to be then standing in the names of J. Keith Fraser and John Staples Alexander; 2, the sum of £3163 17*s.*, being the proceeds of the sale of a head rent of £127 18*s.* 1*d.*, which was invested by the Land Commission in the purchase of £2919 0*s.* 7*d.* India 3 per cent. Stock, which is stated to be "standing in the name of the Irish Land Commission to the credit of the estate of Harry Verner, a vendor of land, and the separate credit of the redemption price of the fee-farm rent of £127 18*s.* 1*d.*, heretofore paid to Lord Massereene and Ferrard, for the lands of Carryhaggin and others, under fee-farm grant of 2nd December, 1852."

The instrument then recites the death of James Keith Fraser, one of the trustees, that Viscount and Viscountess Massereene were desirous of appointing Hugh M'Calmont a trustee of the settlement in the place of James Keith Fraser, "and that the investments particularised in Part 2 of the 5th schedule were intended to be forthwith transferred into the joint names of John Staples Alexander and Hugh M'Calmont." By the operative part of the instrument, Viscount and Viscountess Massereene appointed Hugh M'Calmont a trustee of the settlement, and declared that all estates and interests of John Staples Alexander, as surviving trustee, should respectively forthwith vest in the said John Staples Alexander and Hugh M'Calmont, as joint tenants, upon the trusts applicable thereto by virtue of the settlement or otherwise; and it was by the instrument then declared that John Staples Alexander and Hugh M'Calmont should hold the stocks mentioned in the second part of the 5th schedule upon the trusts, and subject to the powers and provisions applicable thereto respectively by virtue of the settlement or otherwise.

This instrument of April 5, 1898, bore a £1 stamp, of which 10*s.* was the admitted duty upon it, so far as it operated as an "appointment of a new trustee," and the additional 10*s.* was the stamp duty in respect of the vesting declaration contained in it, which was chargeable under the head in the schedule to the Stamp Act of "Conveyance or transfer of any kind not hereinbefore described."

This instrument was presented to the Commissioners of Inland

Q. B. Div. 1899.

MASSEREENE, *Appellant;* COMMRS. IN. REVENUE, *Respondents.*

Palles, C.B.

Revenue on the 20th May, 1898, to obtain the opinion of the Commissioners as to the stamp duty with which it was chargeable. They held that it was liable (in addition to the duties already mentioned) to an *ad valorem* duty of £9, being at the rate of 5*s.* for every £100 and fractional part of £100 of the sum of £3518, which was the admitted value of the investments particularised in the second part of the 5th schedule, based upon their average prices at the date of the instrument. This additional duty the Commissioners decided was chargeable under the head of "Settlement," in the schedule to the Stamp Act, 1891. This further duty of £9, with a penalty of £10 (in respect of the stamping after the prescribed time of the instrument with such additional duty), was duly paid; and by this case Lord Massereene seeks the decision of this Court upon the question whether this £9 was properly chargeable.

Now, in the first instance, abstracting any special considerations arising under the Stamp Act of 1891, it seems clear that, in its true nature, the instrument was not a settlement, but was a deed appointing a new trustee, and vesting in the continuing and new trustees such portions of the trust property as were capable of being vested by such deed.

Further, it seems clear that it is wholly inaccurate to describe the instrument as one whereby "moneys, stocks, or securities are settled, or agreed to be settled." This description, comprises such instruments only as, by their own force, either by actual transfer or by agreement therein contained, impose, or agree to impose, trusts upon property which previously was free from the same. It is essential to such an instrument that there shall be—1, such free property, by which I mean property which then is not, according to our jurisprudence, subject to the trusts in question; 2, a settlor, who either is, or appears on the face of this instrument to be, competent to subject that free property to trusts which, until the execution of the instrument, did not bind it; and 3, an imposition by the instrument of such trusts upon such property. Now, in the present case, each of these three elements is necessarily absent. Each item of property appears by the instrument to have been, prior to its execution bound by the trusts. The first item, the stock of the Belfast and Northern

Counties Railway, was, at the date of the instrument, standing in the name of the trustees of the settlement, and had been purchased with part of the produce of the sale of the settled lands. The Commissioners of Inland Revenue have abstained, and, as I think, rightly, from making any distinction as to this item of property founded upon the character of the investments which are authorised by the trust. Even if the investment were outside the trust, the stock was not the less bound by the trusts of the settlement. The second item, £2919 0*s.* 7*d.* India 3 per cent. Stock, was purchased under the order of a judicial tribunal, with the proceeds of the sale of part of the settled lands. Thus, at the date of the instrument, there was no free property, in the sense in which I have used that expression.

Secondly, there was no settlor. The only parties to the deed who had any beneficial interests in the property were Viscount and Viscountess Massereene. They had no more than limited interests in these moneys as appears by the settlement of 3rd October, 1870, to which reference can be made, as it is recited in the instrument in question.

Thirdly, the instrument does not purport to impose new trusts upon the property. No doubt it contains a declaration that the property shall be held, by the continuing and new trustee, upon the trusts of the settlement; but the prior part of the instrument shows that the reason of that declaration is not the bringing into the settlement additional property not theretofore subject to the trusts, but the introduction of a new trustee, who thereby admits the identity of the stocks with those purchased with the trust funds.

The reason relied on by the Inland Revenue in support of their practice of charging *ad valorem* stamp duty upon an instrument such as that under consideration here, a practice which they tell us has existed since the passing of the Act of 1891, is stated in the 7th paragraph of the case. It is this: that there has not been any previous instrument upon which *ad valorem* settlement duty has been paid "in respect of the amount or value of the proceeds of the sale of the real estate, as represented by the stocks and securities" in question.

Now, there was not, under the Stamp Act which was in force at the date of the settlement of 1870 (just as there is not now),

Q. B. Div. 1899.

MASSEREENE, *Appellant*; COMMRS. IN. REVENUE, *Respondents*.

Palles, C.B.

under the Stamp Act of 1891, any *ad valorem* duty payable in respect of a settlement of real estate. The settlement of 1870, which subjected the lands in question to the trusts which it declared, was duly stamped; and the fact that, when the trusts were imposed, the property now represented by the securities existed in the shape of realty, in respect of which no *ad valorem* duty was payable, is wholly immaterial to the question for decision here. The settlement, and the sole settlement (either in contemplation of law irrespective of the Stamp Act, or within the meaning of the Stamp Act itself), of the property in question, is the deed of the 3rd October, 1870. In my mind, there is no more to be said; *res ipsa loquitur*. That which is subject to duty is an instrument which "settles, or agrees to settle." This neither settles, or agrees to settle, or purports to do so; and therefore the duty is not payable.

In conclusion, I may mention two matters: 1, that if the Commissioners are right, they would appear to be equally entitled to *ad valorem* duty on the £1500 8*s*. 3*d*., which is the value of the settled moneys applied in payment of incumbrances. This they have omitted, and in my opinion rightly omitted, to claim. 2, That although, under the trusts of the settlement, the securities must be deemed, notionally, realty, I have placed no reliance upon this circumstance in forming my opinion, as I should have arrived at the same conclusion had the provisions of the settlement been such that the parties entitled under the trusts might now regard it as personalty.

The first question put to us by the case must therefore be answered in the negative.

The second question has not been argued by the Inland Revenue, and we have therefore thought it unnecessary to consider it.

The £9 paid for *ad valorem* duty, and the £10 penalty must be repaid to Lord Massereene, and the Inland Revenue must pay the costs of the case.

GIBSON, J.:—

If the deed of April, 1898, is not "a settlement" within the definition of the Stamp Act, 1891, it is conceded that it does not require an *ad valorem* stamp, as there does not appear to be any other term in the statute which would make it so chargeable. The

provision at the end of the deed, declaring the trusts, was much relied upon by counsel as making the instrument a settlement. They did not, however, contend that such provision was a "Declaration of Trust" as defined by the schedule to the Act. If it was, it would only require a 10*s.* stamp. If *Kronheim* v. *Johnson* (1) applies to the "Declaration of Trust" in the schedule, the deed would not be a declaration of trust, as such declaration can only be made by a beneficial owner competent to impress property with a trust. If it is not a declaration of trust, *a fortiori* is it not a settlement. I do not, however, say that the case does apply.

Neither, according to the ordinary nor the conveyancing meaning of the word, was the indenture of 1898 a settlement. It settled nothing, and there was no settlor. It merely appointed a new trustee, with ancillary clauses for effectuating the transfer of the trust property then subject to the trusts of the original settlement. The argument on behalf of the Commissioners is, that it must be deemed to be a settlement in order to escape what they suppose to be a manifest absurdity, or rather lacuna, in the taxing legislation. If the specific money or stock had been settled by the original settlement, *ad valorem* duty would have been payable. They contend that where by sale of land, or otherwise, such money or stock comes into existence subject to the settlement trusts, the first instrument dealing with such money or stock as affected by the settlement must be liable to *ad valorem* duty where no such duty has been previously paid. How far is this argument supposed to go? Does it extend to every change of investment, where a new specific stock becomes subject to the trusts, such stock never having, *eo nomine*, paid duty? Mining shares, originally settled, might have been then of nominal value, say, £100. By rise in value, and by judicious changes of investment, the original investment might come to be represented by £10,000 Consols. Counsel for the Commissioners declined to admit that the appointment of new trustees of the £10,000 Consols would not be liable for duty, even though settlement duty had been paid on the original £100. I think that it is clear that no subsequent change of value or investment of settled property can found any such claim to *ad valorem* duty. See *Onslow's Case* (2).

(1) 7 Ch. Div. 60. (2) 24 Q. B. Div. at p. 589.

Q. B. Div. 1899.

MASSEREENE, *Appellant*; COMMRS. IN. REVENUE, *Respondents*.

Gibson, J.

I entirely reject the novel principle now put forward, that it is the duty of the Court, by construction, to supply a deficiency or hiatus in a taxing statute, or extend its operation to a case not clearly within it. As Lord Cairns said in *Partington's Case* (1):—"If the Crown cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be." The proceeds of sale here were impressed with the character of realty, which makes the case all the stronger, though my decision does not depend on this consideration. The deed of 1898 cannot be deemed to be what it was not, namely, a settlement, merely to make good real or imaginary defects in the legislation. No distinction was suggested by counsel with regard to the various classes of investment on which the *ad valorem* duty was assessed and paid. The *ad valorem* duty was wrongfully exacted, and must be refunded.

MADDEN, J.:—

The argument on behalf of the Inland Revenue attributes to the declaration of trust usually contained in a deed of appointment of new trustees a conveyancing operation and character which it never possesses. The fallacy consists in confounding two instruments of a totally distinct character, of which each is commonly described as a declaration of trust, but one is so only in name. There is a kind of declaration of trust which fulfils all the requirements of a settlement, as enumerated by the Lord Chief Baron. When the owner of unsettled property imposes upon property real or personal, a series of limitations or trusts, by a covenant to stand seised, or by a declaration of trust, the instrument by which this is effected may be properly described as a settlement; and if the subject-matter is a definite and certain sum of money, it is liable to an *ad valorem* duty under the Stamp Act. In such a case the effect of the execution of the instrument is to convert free into settled property, and in this consists the essence of a settlement.

The kind of declaration of trust with which we are dealing in the present case has no such operation. It creates no new trusts, but

(1) L. R. 4 H. L. at p. 122.

simply recognizes those which already exist. It has, indeed, an operative effect in certain cases, but never by way of settlement of the trust property. Whenever the whole or part of the trust property is conveyed to the new trustees by an instrument which, if it stood alone, would pass the beneficial as well as the legal interest, a declaration of trust forms an important part of the instrument by which the new trustees are appointed. By it they are estopped from setting up a claim to a beneficial interest in the property so conveyed to them, and from denying its identity with the subject-matter of the trust.

The Law of Property Amendment Act, 1859, by which personal property was rendered assignable by one to himself and another, and the Conveyancing Act, have limited the number of instances in which separate deeds of conveyance to the new trustees are necessary. Unless in the case of stocks and shares the deed appointing new trustees now usually vests the trust property in them, either by way of conveyance or by statutory declaration under the Conveyancing Act. In such a case a declaration of trust cannot be said to have any operative effect whatever. For if it were absent, the new trustees would be as effectually, though less explicitly, estopped from denying that they held the property upon the trusts of the settlement recited in the deed of appointment. In no case can this declaration be pushed further than a formal recognition of the duties and obligations incurred by the acceptance of a conveyance of property, with notice of the trusts by which it is affected. I adopt Mr. Davidson's language, when, in suggesting the simplification of the older form of declaration, he observes:—"The trusts and powers subsisting in the trust property depend, not on the instrument transferring the trust estates, but on the instrument creating the trust."

Mr. Price suggested the true test when he asked who was the settlor in the instrument which we are asked to treat as a settlement. Certainly not the tenant for life; and as certainly not the trustees, from whom the declaration proceeds, but who have no beneficial interest in the property. The moneys which represented the settled land were as truly and effectually settled property before the execution of the appointment as they are at the present moment.

Q. B. Div. 1899.

MASSEREENE, *Appellant*; COMMRS. IN. REVENUE, *Respondents*.

It is not necessary to call in aid the principle that a statute imposing taxation must be construed strictly. For to describe as a settlement an instrument which settles nothing, but simply recognises an existing state of things, is, under any circumstances and for any purpose, a misapplication of legal terms.

Solicitors for the appellants: *Richardson & Synnott.*
Solicitor for the respondents: *R. O'Brien Furlong.*

J. M°G.

IN RE BUTLER, A BANKRUPT (1).

Q. B. Div. Bankruptcy. 1899. June 24. Nov. 24.

Bankruptcy—Company—Shares—Deposit by owner with bank—Notice of act of bankruptcy—Subsequent adjudication—Order and disposition—Irish Bankrupt and Insolvent Act, 1857, *sect.* 313.

Where an owner of shares in certain Companies deposited the scrip with a bank to secure an advance, without any memorandum in writing or duly executed transfer, and the bank, before adjudication, served notice of such assignment on the Companies, with knowledge, however, of an act of bankruptcy committed by the owner :—

Held, that where the certificates contained a proviso that they must be produced on registration of the transfer, such shares were not in the order and disposition of the bankrupt ; but that where the certificates contained no such proviso, the shares were in the order and disposition of the bankrupt, the notice of transfer not having been served upon the Companies by the bank before becoming aware of the act of bankruptcy.

THIS was an application on behalf of the official assignees to have it declared that certain shares, the certificates of which had been deposited by the bankrupt with the National Bank to secure an overdraft on his current account, were in the order and disposition of the bankrupt within the meaning of the Irish Bankrupt and Insolvent Act, 1857, section 313, and for an order for the sale of the shares.

The deposit was made by the bankrupt on the 22nd October, 1897, and on the 4th December, 1897, respectively. The bank alleged that they gave notice of the deposit to the various companies on the 29th December, 1897 ; but prior to that date the bankrupt had committed an act of bankruptcy. The evidence brought forward to support and resist the motion was chiefly directed to the question, whether or not, the bank, at the time they served notice of the deposit on the companies, were aware that an act of bankruptcy had been committed. This evidence, together with the other material facts of the case, is fully set out in the judgment of Boyd, J.

(1) Before BOYD, J.

Q. B. Div. 1899.

In re BUTLER.

Blood, Q.C., and *Philip White*, for the assignees :—

We submit on the facts that the bank had notice of the act of bankruptcy before they served notice of the deposit upon the companies, and therefore the shares are in the order and disposition of the bankrupt; *In re Grehan* (1); *In re Stevenson* (2). Even assuming that there was no notice of the act of bankruptcy, such notice is immaterial: *In re Stevenson* (2).

Ignatius O'Brien, Q.C., for the National Bank :—

It is clear from the bank manager's affidavit that the bank had no notice of the act of bankruptcy before they served notice of the deposit upon the companies. If that be so, service of notice before adjudication completes the equitable title of the bank, and the shares are therefore not in the order and disposition of the bankrupt: *Graham* v. *Furber* (3); *Ex parte Smith* (4); *Young* v. *Hope* (5). No doubt, *In re Stevenson* (2) appears to decide that notice is immaterial, but the case was argued and decided without reference to the English authorities, and a close examination of the report goes to show that that the decision was based on the fact that the bank had notice of the act of bankruptcy. The Vice-Chancellor has decided in *Malet's Trusts* (6) that an equitable assignee may perfect his title even after adjudication by giving notice of his assignment, unless or until an order of the Court of Bankruptcy under the 313th section has been made. So far as there are any shares, the certificates of which contain a proviso that the shares are not transferable without the production of the certificates, *The Colonial Bank* v. *Whinney* (7) is a conclusive authority in our favour.

[Counsel was proceeding to argue that the principle laid down in *The Colonial Bank* v. *Whinney* (7) applied where the articles of association contained a similar proviso, but was stopped by the Court.]

(1) Ir. R. 1 Eq. 84.
(2) 27 L. R. Ir. 309.
(3) 14 C. B. 134.
(4) 2 M. D. & D. 113.
(5) 2 Ex. 105.
(6) 17 L. R. Ir. 424.
(7) 11 App. Cas. 426.

BOYD, J.:—

On the 22nd October, 1897, and on the 4th December, 1897, Alexander Butler handed to his bankers, the National Bank, the certificate of shares held by him in ten different companies on an equitable deposit to secure any overdraft on his current account. There was no memorandum in writing in reference to the terms of the said deposit, nor was any transfer executed to the bank by the bankrupt. No notice of such deposit was given to the companies who had issued the said certificates until the 29th December, 1897, when the bank allege they gave notice of the fact to each of the said companies. Several of the companies deny, as stated in the affidavit of Mr. McEntire, of 23rd June, 1899, that they ever received such notice. On the 30th January, 1898, Butler was adjudicated a bankrupt, and the act of bankruptcy on which he was so adjudicated was his having absconded from Ireland on the 4th or 5th December, 1897.

It having become material to fix the date at which the bank became aware of Butler's absconding, affidavits were filed in reference thereto. Mr. Casey, the manager of the bank at Ennis, where the transactions took place, made an affidavit on the 31st January, 1899, in which he positively states that for "some months after the 30th December, 1897, I had not notice and did not know, that the bankrupt had left the country for the purpose of defeating his creditors . . . in fact, did not know that he had left the country at all."

In reply to this affidavit Mr. Goodbody, managing director of Messrs. James Bannatyne, Sons & Co., Ltd., the petitioning creditors, made an affidavit on 30th May, 1899, directly contradicting this statement in Mr. Casey's affidavit, and stating that having received a letter from the bankrupt dated 7th December, 1897, and written from the Charing Cross Hotel, London, and received by him in Limerick on the 9th December, 1897, he on 10th December, 1897, went to Ennis and called on Mr. Casey, and told him that the bankrupt had gone away and left the country. Mr. Goodbody is unable to say whether he showed Mr. Casey the letter he had received from the bankrupt, but thinks it probable that he did, but that if he did not show the letter he told him where the bankrupt had gone.

Q. B. Div. 1899. In re BUTLER. Boyd, J.

Mr. Robert Butler, who resides in Navan, and is a brother of the bankrupt received a letter from the bankrupt dated 4th December, 1897, stating, "By the time this reaches you I shall be on the ocean," and that he was ruined. On the 11th December, 1897, he went to Ennis, and saw Mr. Casey, who at once informed him that his brother (the bankrupt) had left the country, and asked him if he was aware of it, and that he informed Mr. Casey that he was, and that Mr. Casey then said, "Do you know where he is?" I said, "I did not." "Well," said he, "I will tell you. He has gone to South Africa, and you go and see Mr. Gillespie, who has a son in South Africa, and get the son's address in South Africa. Your brother knows him and will probably go to him." "Write there," said Casey, "to your brother at once, and get a power of attorney from him. We can't do anything without it." "Don't let the grass grow under your feet," said he. He also states in his affidavit that Mr. Casey informed him that Mr. Goodbody had been with him the day before, and told him his brother had left the country, and that he, Mr. Goodbody, had a letter from his brother (the bankrupt) saying that he went to South Africa, and that Mr. Casey gave him the first intimation of where his brother had gone. He also states in his affidavit that he showed Mr. Casey the letter he had received from his brother. It is to be observed that no mention of South Africa is contained in the letter to Mr. R. Butler, but it is mentioned in the letter to Mr. Goodbody. It does not appear that Mr. R. Butler saw Mr. Goodbody before he (Butler) saw Mr. Casey, and Mr. Goodbody states in his affidavit, sworn on the 18th December, that he saw him on the 13th December, from which I infer he had not seen him previously. Apparently the only one who knew about the bankrupt having gone to South Africa was Mr. Goodbody. How, then, was Mr. Casey able on the 11th December to inform Robert Butler about South Africa unless he had heard it from Mr. Goodbody on the 10th December?

It is to be further observed that Mr. Casey states in his first affidavit, already referred to, that having on the 6th December received a letter from the bankrupt, directing him to sell the shares in his (Mr. Casey's) possession, on the same evening he wrote to Dublin to sell the shares, and that same were sold on 8th

December, but that the sale could not be carried out as the bankrupt was not at hand to sign the transfers. This strongly corroborates the statements of Robert Butler in his affidavit, that Mr. Casey requested him to write to young Gillespie to get a power of attorney signed by the bankrupt. Robert Butler knew nothing about the transfer or the necessity for a power of attorney, and could not have invented the account he gives of the interview.

In his first affidavit Mr. Casey does not state anything about the bankrupt having gone or the possibility of his going to South Africa, and does not refer to South Africa at all, but in his second affidavit sworn on the 20th June, 1899, he admits that South Africa was mentioned by Mr. Goodbody at the interview. I am therefore on the evidence convinced, that Mr. Casey on the 10th December heard from Mr. Goodbody of the departure of the bankrupt for South Africa, and that he is not correct in his statement, that he did not hear of the fact for some months after the 29th December, on which day he for the first time gave notice, as he alleges, to the various companies of the deposit of the shares with him.

From an affidavit made by the bankrupt after his return from South Africa in the month of June, 1898, it appears he left Ireland on the 7th December, 1897, for the purpose of going abroad.

From Mr. McEntire's affidavit, sworn on 23rd June, 1899, it appears that several of the companies, the scrip or certificates of whose shares were deposited in the bank, deny that they received any notice whatever of such deposit, while others admit having received notice, but not till the 29th December, 1897, and long after the date at which, I am of opinion, the bank had notice of the act of bankruptcy which had been committed by the bankrupt.

A letter written by Mr. Goodbody to Mr. Casey, dated 24th June, 1899, has been given in evidence, but I can place no reliance on the statements therein contained, and prefer to rely on the statements in his affidavit for the reasons before stated. I think this letter was written for the purpose of excusing Mr. Casey with his directors, and the statements therein are unreliable, and are contrary to the sworn statements of the writer.

The solicitor for the bank has furnished a list of the several

Q. B. Div. 1899.

In re Butler.

Boyd, J.

securities deposited with the bank, and therein specifies those whose certificates contain a proviso that the certificates must accompany any transfer of the shares, and those which do not contain any such stipulation.

I refer to this list as the decision in the case of *The Colonial Bank* v. *Whinney* (1) was based upon the fact that the certificates in that case contained a proviso in the following terms:—"Note—In the event of sale or transmission this certificate must be surrendered with the deed of transfer, whether the deed transmits all or any of the shares, before the transfer can be registered or a new certificate issued." The House of Lords decided in that case that having regard to the note upon the certificates, the shares were not in the possession, order, or disposition of the shareholder under such circumstances, that he was the reputed owner thereof within the meaning of the Bankruptcy Act, 1883, sect. 44, sub.-s. 3.

The Irish Bankruptcy Act of 1857, sect. 313, differs in several important respects from the English Act referred to, but in my opinion the difference in no way affects the decision in *The Colonial Bank* v. *Whinney*, and I accordingly hold that that case governs the shares in the present case where the certificates provide, that they must be produced upon the occasion of the registration of the transfer.

The terms (section 313) of the Irish Bankruptcy Act of 1857 differ materially from those of sect. 44, sub-section 3, of the English Bankruptcy Act of 1883. There is no reference in the Irish Act to the goods mentioned therein being in the possession, order, or disposition of the bankrupt *in his trade or business*, and there is a proviso as in the English Act "that things in action other than debts due or growing due to the bankrupt in the course of his trade or business shall not be deemed goods within the meaning of this section." In the case of *The Colonial Bank* v. *Whinney* (1) it was decided as one of the grounds for reversing the decision of the Court of Appeal, that the shares therein were "things in action" within the meaning of the proviso in the sub-section.

As to the remaining shares whose certificates contain no provision, that they must be produced upon the occasion of the registration of the transfer, I am of opinion that the bank did not

(1) 11 App. Cas. 426.

perfect their title to them, and that they remained in the order and disposition of the bankrupt, and that the assignees of the bankrupt are entitled to them.

In the case of *Assignees of Dunne* v. *The Hibernian Joint Stock Company* (1) the Vice-Chancellor at page 99 states that "choses in action and other property of that nature must be dealt with in analogy to the rule which, irrespective of bankruptcy, prevails with respect to such property; and whether such be trust funds vested in a trustee for the bankrupt or shares remaining in the books of a company in the name of a bankrupt, they do not come within the operation of the 313th sect. *if everything has been done to complete the equitable title of the person alleged to be the true owner.*"

What is necessary to complete the equitable title of the person alleged to be the true owner? That he should have given notice, in this case to the companies, before the bank knew that the shareholder had committed an act of bankruptcy: *Dearle* v. *Hall* (2). In my opinion no such notice was given, if at all, till long after they knew of the act of bankruptcy on the 10th or 11th December, 1897; and no notice is alleged to have been given till the 29th December, 1897. In *Robinson* v. *Jenkins* (3), Fry, L.J., states "the shares . . . . are choses in action, and are registered in the name of the plaintiff, and he has power and disposition over them." In the case of *In re Grehan* (4) it was expressly decided that a deposit of scrip certificates of shares in a Joint Stock Company, without notice to the Company of such deposit, will not take them out of the order and disposition of the owner while they remain registered in his name, although, according to the *practice* of the Company, shares in it cannot be transferred without the production of the certificates.

In the present case the deposit of the shares in the bank was not accompanied by any writing stating the terms or grounds of the deposit, nor was any blank transfer signed or sealed by the bankrupt as in the case of *The Colonial Bank* v. *Whinney* (5). It would be much more satisfactory, having regard to the fallacious

(1) Ir. R. 2 Eq. 82.
(2) 3 Russ. 1.
(3) 24 Q. B. D. 275.
(4) Ir. R. 1 Eq. 84.
(5) 11 App. Cas. 426.

Q. B. Div. 1899.

In re BUTLER.

Boyd, J.

memory of Mr. Casey, had a letter or document existed showing the terms on which the certificates were deposited in the bank, the more especially as the bankrupt in his letter to Mr. Casey of the 6th December, 1897, seems to assume that he had the power to sell the shares or demand their return to him as he thought fit. This letter commences, "I have decided to sell nearly all the shares in your possession," and proceeds, "I give a list herewith of this day's price, and commission you to sell and place amount to my credit. I will thank you at the same time to give bearer following deposited with you:—40 British Chartered; 20 London and Globe Marine; 6 Ivanhoe Gold Corporation; lease of Barrowmore House, lodged to-day, and the Insurance policy."

It does not appear in evidence before me whether these documents were or were not given to bearer as requested, but they do not appear in the list furnished by the bank. However, the letter appears to indicate that the bankrupt considered he had a right to sell or receive what the bank had in their possession.

As each party has partially failed in their contention as to their right to the shares, I make no order as to the costs of this application except that the assignees shall be entitled to receive theirs out of the estate.

Solicitor for the assignees: *W. G. Ellis.*
Solicitor for the National Bank: *Scallan.*

J. MAC M.

DUKE OF DEVONSHIRE AND OTHERS, APPELLANTS; DROHAN, RESPONDENT (1).

Q. B. Div. 1899.

June 6, 7, 8, 9, 14, 19.

Salmon Fishery (Ireland) Act, 1863 (26 & 27 *Vict. cap.* 114), *ss.* 9, 12—*Certificate of Special Commissioners declaring a weir to be legal, its effect —Free gap—Justices, jurisdiction to convict (a) for not making legal free gap, (b) for not maintaining same, notwithstanding order of Special Commissioners of Fisheries certifying the weir and gap to be legal—Judgment in rem.*

D. was prosecuted, in 1898, before Justices (under 26 & 27 Vict. c. 114, s. 12), for (*a*) not making a free gap in his weir at Lismore in accordance with the four regulations of s. 9 of that Act; and, (*b*) for not maintaining a free gap therein in accordance with those regulations. D. set up as a defence an order dated 15th February, 1866, of the Special Commissioners, certifying that a free gap had been made therein (in compliance with an undertaking by D.), and deciding the said weir to be legal; and D. further proved that the free gap had been constructed in accordance with plans approved of by the Commissioners, and had not been in any way altered since 1866. The Justices convicted upon the complaint for not making, their order being silent as to the second complaint (non-maintenance); but stated that they adopted the defendant's view, that if there was a conviction for not making (s. 12, sub-sect. 1) there could not be a conviction for not maintaining (s. 12, sub-sect. 2), "but should the Court be of opinion that we were wrong in so doing, then, in our opinion, a free gap has not been maintained in the following particulars":—1, The gap not being situate in the deepest part of the stream; 2, the sides of the gap not being in a line with and parallel to the direction of the stream at the weir; 3, the bottom of the gap not being at the time of its construction, or since, level with the natural bed of the stream.

On case stated on the question, 1, whether the Justices were entitled, on the facts found, to convict for not making a free gap; and, 2, whether upon the facts found, and having regard to the conviction for not making, they were debarred from convicting for not maintaining the free gap:—

Held (by Palles, C.B., and Andrews, J.; O'Brien, J., dissenting, and Murphy, J., expressing no opinion), that the determination of the Special Commissioners upon the legality or illegality of the weir was a judgment *in rem*, and conclusive against the world; and that, therefore, the conviction for not making a legal free gap was wrong in law;

But held *per Curiam*, that (the conviction for not making being reversed as erroneous) the Justices should have convicted the defendants on the complaint

(1) Before PALLES, C.B., and O'BRIEN, ANDREWS, and MURPHY, JJ.

Q. B. Div. 1899. DEVONSHIRE *Appellant*; DROHAN, *Respondent*.

for non-maintenance, not upon any finding that the level of the floor of the gap, or its width, were not in accordance with the regulations of section 9 (these having remained unchanged since 1866), but upon the finding of fact that (by reason of the action of the defendant in closing up three hatches on the south wall of the weir) the flow of the stream had been altered, and the sides of the gap, therefore, had not been maintained in a line with and parallel to the direction of the stream at the weir.

CASE stated, for the opinion of the Queen's Bench Division pursuant to 20 & 21 Vict. c. 43, on the hearing at Lismore Petty Sessions of a summons at the prosecution of Thomas Drohan against the Duke of Devonshire, and (his lessees) Richard Foley and Edmond Foley, as owners of the Lismore Salmon Weir. The summons was in the following terms:—

"That a certain fishing weir, namely, the Lismore Weir, in the River Blackwater, near Lismore, in the county of Waterford and Petty Sessions District aforesaid, was at the date of the commencement of the Salmon Fishery (Ireland) Act, 1863, without a legal free gap, and so continued up to the period of six calendar months immediately preceding the making of the said complaint, and that you, the defendants, having been for a period of twelve months next preceding the making of the said complaint, and still being the owners of the said weir, did not, during the said period of six months, make a legal free gap in the said weir, but, being such owners as aforesaid, did leave the same without such gap during the said period of six months, and every part thereof: the gap, which has been and is in said weir, being illegal in the following particulars:—

"1. The free gap is not situate in the deepest part of the stream.

"2. The sides of the gap are not in a line with or parallel to the direction of the stream at the weir.

"3. The bottom of the gap is not level with the natural bed of the stream above and below the gap.

"4. The width of the gap, in its narrowest part, is less than one-tenth of the width of the stream, and is less than fifty feet.

"And, further, that the free gap in a certain fishing weir in the River Blackwater, near Lismore, in the county of Waterford, called the Lismore Weir, of which weir you, the defendants, during the whole of the period of six months immediately preceding the making of the said complaint, have been and still are the owners, was not, during such period of six months, or any part thereof, maintained in accordance with the provisions of the Salmon Fishery (Ireland) Act, 1863, in the following particulars, namely:—

"1. The free gap was not situate in the deepest part of the stream.

"2. The sides of the gap were not in a line with and parallel to the direction of the stream at the weir.

"3. The bottom of the gap was not level with the natural bed of the stream above and below the gap.

"4. The width of the gap, in its narrowest part, was less than one-tenth of the width of the stream, and was less than fifty feet."

The hearing of the summons occupied four days before the Justices (17, 19, 20 December, 1898, and 28 January, 1899), and a shorthand writer's note of the evidence was incorporated in the case stated. The following statement is taken from the case and the documents in evidence :—

Prior to 1863, the Duke of Devonshire was owner of a several fishery in portions of the Lower Blackwater, and also of the several fishery in that part of the Upper Blackwater anciently known as "The Bishop's Fishery," which included the Lismore Weir, adjoining Lismore Castle. The Lismore Weir was then without a free gap. After the passing of the Salmon Fishery Act of 1863, the Fishery Commissioners (in 1865) held an inquiry and obtained an undertaking from the Duke that a free gap would be made therein. Plans were accordingly submitted to and approved of by the Commissioners; and, a free gap having been made in the weir in accordance with those plans, the Commissioners on the 15th February, 1866, issued a certificate or order, reciting the holding of the inquiry of 1865, and that it had been then decided that the weir was illegal only by reason of its not having a free gap as required by law, and that the Duke had since made and opened a free gap in said weir "as shown on the space coloured red on the plan hereto"—and deciding and declaring the said weir to be legal.

In November, 1867, a complaint was made at Lismore Petty Sessions by E. O'Callaghan Foot against the Duke, alleging (in the summons) that, on the 1st October, 1867, the defendant "did . . . maintain in the said weir a free gap the bottom of which was higher than the natural bed of the stream of the said river above and below the said gap." The Justices found that the gap had been made in conformity with the directions of the Commissioners, and had not been altered in any way, but that the bottom of the gap was on the 1st October, 1867, higher than the natural bed of the stream above and below the gap; and they convicted the defendant, imposing a fine of £2 10*s.*, and £5 costs, and, at the

Q. B. Div. 1899.

DEVONSHIRE *Appellant;* DROHAN, *Respondent.*

defendant's request, stated a case for the opinion of the Court of Queen's Bench, who (Whiteside, C.J., and George, J., *diss.* Fitz Gerald, J.) held that notwithstanding the order of the Commissioners of the 15th February, 1866, the Justices had jurisdiction to convict the defendant: see the report *Devonshire* v. *Foot* (1) where the facts will be found more fully stated.

The Duke thereupon applied to the Court of Chancery for a writ of prohibition to restrain the Justices from proceeding to enforce the penalties under the conviction. A conditional order was obtained from Lord Chancellor Brewster on the 4th July, 1868, and, in February, 1869, on motion to show cause, Lord Chancellor O'Hagan gave liberty to the Duke to declare in prohibition; and directed that the motion to show cause should stand over until further order: see the report *In re Devonshire* (2).

A declaration in prohibition having been filed accordingly, the defendant Foot pleaded the decision of the Queen's Bench as final and conclusive; but, on demurrer to this plea, Lord Chancellor O'Hagan held that, as the finality of the decision of the Queen's Bench depended on the fact of the Justices having jurisdiction, and as this Court was of opinion that they had no such jurisdiction, the demurrer should be allowed: see the report *Devonshire* v. *O'Callaghan Foot* (3).

This decision was taken on writ of error to the Court of Exchequer Chamber (Monahan, C.J, Pigot, C.B., O'Brien and Keogh, JJ., Fitz Gerald and Deasy, BB., Morris and Lawson, JJ.) who held that the case was not one for a prohibition, and that the order of O'Hagan, C., should be reversed.

[A report of the judgments delivered on this occasion will be found, *infra*, p. 211. No appeal was taken from the decision of the Court of Exchequer Chamber.]

On the 27th January, 1873, an application was made to the Queen's Bench on behalf of the Duke of Devonshire for a writ of *certiorari* to bring up and quash the conviction of November, 1867, on the ground that the summons disclosed no offence in law. A conditional order having been granted, the matter came again before that Court on the 12th December, 1874, on motion to make

(1) I. R. 2 C. L. 514. (2) I. R. 3 Eq. 412. (3) I. R. 5 Eq. 314.

absolute the conditional order, when the majority of the Court (O'Brien and Fitz Gerald, JJ., *diss.* Whiteside, C.J.) held that the motion should be granted, so that the matter might be disposed of upon the return to the writ (1). In May, 1875, the case having been listed on motion for a concilium, and there being no opposition (Foot being dead), the Court made an order quashing the conviction (2).

It would appear that on the 27th January, 1873, counsel for Mr. Foot had applied to the Lord Chancellor to set aside the writ of prohibition; but whether the writ was actually ordered to be set aside is not clear.

From the plans and maps produced, and the evidence, it appeared that the free gap was constructed in 1865–1866, in strict accordance with the directions of the Commissioners, at the place where stood an ancient fishing hatch ("the Collector hatch"), and that the bottom or sill of that hatch was in 1865–1866, taken as the level for the sill of the Queen's Gap then erected in its place; and the evidence tended to show that this level was even at that time somewhat above the natural bed of the stream. The evidence further went to show that by reason of three hatches in the south wall of the weir being subsequently closed up, shoals or banks had formed, and the flow of the stream diverted as mentioned in the findings of fact (paragraph 8) so that the sides of the gap were no longer parallel to the direction of the stream at the weir. The existence of those shoals also created some confusion as to the proper mode of ascertaining what the natural bed of the stream was, *i.e.* whether soundings should be taken to the surface of these shoals as they now exist, or by boring down to the natural bed as it had existed before these shoals had formed. Another matter in discussion, owing to the peculiar structure of the weir, was the proper method of measuring the width of the stream in order to determine what the width of the gap should be; but the two questions upon which the decision of the Court now turned were substantially the effect (*a*) of the certificate of 1866, and (*b*) of the finding in paragraph 8, that the sides of the gap were no longer parallel to the direction of the stream at the weir.

(1) Not reported. (2) Not reported.

Q. B. Div. 1899.

DEVONSHIRE *Appellant*; DROHAN, *Respondent*.

The findings of fact, set out in the case, were as follows:—

"1. It was not proved on the part of the complainant that the gap, when it was constructed, was not situated on the deepest part of the stream.

"2. It was not proved on the part of the complainant that the sides of the gap when it was constructed were not in a line with and parallel to the direction of the stream at the weir. It was proved on the part of the defendants that the stream at that time flowed east and west through part of the weir, and turned towards the south at a point opposite to where the gap was made.

"3. As to the question whether at that time the bottom of the gap was level with the natural bed of the stream above and below the gap it was contended (*inter alia*) for the defendants that the way to find the natural bed of the stream was to take the average of cross-soundings at intervals above and below the weir. The points selected by the defendants for the purpose of taking cross-soundings were arbitrarily selected and excluded the abnormally deep parts of the stream but included the abnormally shallow. No sounding was taken in the deepest part of the stream immediately below the gap, on the ground that the depth here was abnormal. Had cross-soundings been taken by the defendants through all the stream between the extreme points selected by them, a line drawn through them would have passed below the present bottom of the gap. We did not accept the view put forward by the defendants. In our opinion, by 'natural bed of the stream' in 26 & 27 Vict. c. 114, s. 9, sub-s. 3, is meant the bed, as it would exist, were the stream allowed to flow uninterrupted by a weir or any other artificial construction. It was proved that the bottom of the gap was not at the time of its construction level with the natural bed of the stream, above and below the gap, as we have defined it.

"4. For the complainant it was contended that the width of stream was, having regard to the construction or shape of the said weir, to be found by measuring in a straight line from bank to bank through or across the gap; and it was proved that in no case could a shorter measurement than 480 feet be found in this way, the width of the gap being 31 feet 6 inches. For the defendants it was pointed out that every measurement so going through the

gap would run in some part of its course in the direction of the flow of the stream, and it was submitted that it was not necessary to measure through the gap itself, but that a line taken across the stream at the beginning of the north wall of the weir, or the sum (? mean) of the lines taken across the divisions of the stream immediately below the gap, such lines being at right angles to the current, accurately represented the width of the stream for the purpose of the statute. In our opinion, 'width of the stream' in sub-sect. 4 of sect. 9, means average width of the stream throughout the weir. It was not proved for the complainant that the average width so taken did at the time of the construction of the gap exceed 315 feet. For the defendants it was proved that the gap when constructed was 31 feet 6 inches wide.

"5. On the foregoing points relating to the state of the gap at the date of its completion the defendants relied on the certificate given by the Commissioners of Irish Fisheries, dated the 15th day of February, 1866.

"6. For the defendants it was also contended that, should they be convicted under sub-section 1, of sect. 12, for not making a legal free gap, they could not be convicted under sub-sect. 2 for not maintaining a free gap. We adopted this view, but, should the Court be of opinion that we were wrong in so doing, then, in our opinion, a free gap has not been maintained in the following particulars.

"7. The gap is not situate in the deepest part of the stream. For the complainant it was proved that the deepest part of the stream is at present, and was for six months prior to the making of the complaint, opposite to the site of an old killing hatch now closed.

"8. The sides of the gap have not been maintained in a line with and parallel to the direction of the stream at the weir. It was proved for the complainant that since the gap was constructed three hatches in the south wall of the weir had been filled up. The effect of this, it was proved, was to throw the flow of the water to the north side of the weir, causing shoals to form on the north side of the south wall, and to scour away an island which was in front of the tail hatch. The result of this has been to diminish from time to time the tendency of the stream to divert from north

Q. B. Div. 1899.

DEVONSHIRE *Appellant*; DROHAN, *Respondent*.

to south opposite the gap, and to cause it to continue its flow from west to east, so that the sides of the gap are no longer parallel to the direction of the stream at the weir.

"9. It was proved for the complainant that the bottom of the gap, which, in our opinion, was not at the time of its construction level with the natural bed of the stream, as defined by us, has not since become so.

"10. It was not proved for the complainant that since the construction of the gap the width of the stream, as defined by us, has been greater than 315 feet, or that the width of the gap had been less than 31 feet 6 inches."

Upon these findings, the Justices ordered and adjudged as follows;—

"That the defendants be convicted, for that the Lismore Weir, in the River Blackwater, near Lismore, in the county of Waterford, and Petty Sessions District of Lismore, of which they are owners, was at the date of the commencement of the Salmon Fishery (Ireland) Act, 1863, without a legal free gap, and so continued up to the period of six calendar months immediately preceding the 26th day of November, 1898, and that the defendants, being the owners of the said weir, did not within twelve months from the passing of the said Act nor during the said period of six months make a legal free gap in the said weir—the gap which has been, and is, in said weir being illegal, in that the bottom of the gap is not, and never was, level with the natural bed of the stream above and below the gap; and it is ordered that the defendants do pay for fine, in respect of each day during the said six months, such sum, exceeding five pounds and less than fifty pounds, as amounts, in respect of the total number of days aforesaid, to the sum of £1000; and it is further ordered, that in default of payment of the said sum of £1000 the said sum be levied by distress and sale of the goods and chattels of the defendants."

D. B. Sullivan, Q.C. (*The Right. Hon. The Mac Dermot, Q.C.*, and *Sandford*, with him), for the appellant:—

The decision of the Court of Queen's Bench in 1868 in *Devonshire* v. *Foot* (1), even if given upon the express point now in controversy, is not binding or conclusive in this Court, as no appeal lay from that decision: see *Lutton* v. *Thompson* (2); *Cassidy* v. *Moore* (3); *Stevenson* v. *O'Neill* (4); and *Coulter* v. *Martin* (5).

(1) Ir. R. 2 C. L. 514.
(2) Ir. R. 10 C. L. 10.
(3) Ir. R. 10 C. L. 216.
(4) Ir. R. 11 C. L. 134.
(5) Ir. R. 11 C. L. 477.

The first question is the effect of the certificate of the Fishery Commissioners in February, 1866, declaring the weir legal. That certificate was properly received in evidence below, and the Commissioners had full authority, under the Act of 1863, to make it: see *per* Monahan, C.J., in *Devonshire* v. *Foot* (1). That certificate is, we submit, conclusive proof that the free gap was properly constructed in 1866, and that it was in accordance with all the requirements of section 9 (1863) as found and certified by the special tribunal appointed for the purpose of carrying the provisions of that Act into execution. Such a certificate or order of these Commissioners is in the nature of a judgment *in rem*, and binding upon every one; and the Justices were not entitled to question its validity: see the *Lax Weir Case* (2); *Wilson* v. *Moy Fishery Company* (3); *Reg.* (*Coghlan*) v. *Fishery Inspectors* (4); *Alexander* v. *Shiel* (5).

Further, the Justices base their decision upon their interpretation of what was "the natural bed of the stream"; and that interpretation being, it is submitted, a misconstruction of the Act, the decision is erroneous in law, and the conviction cannot be supported: *Pollard* v. *West* (6).

In regard to the second complaint (on which the Justices arrived at no determination one way or the other), the only question submitted for the opinion of the Court is whether, in effect, a conviction for not making a legal free gap precluded the Justices from convicting for not maintaining; and we submit that it would be an obvious injustice to convict for not making a legal free gap, and also at the same time for not maintaining one, and to impose penalties in regard to both complaints.

[Counsel also argued, upon the facts, that there was no evidence to support a finding that the bottom of the gap was not level with the natural bed of the stream, or the findings of the Justices in regard to the non-maintenance of the free gap.]

(1) Ex. Ch. *infra*, p. 211.
(2) Ir. R. 2 C. L. 519, n.
(3) 28 L. R. Ir. 320.
(4) [1896] 2 Ir. R. 40, 57.
(5) Ir. R. 6 C. L. 510.
(6) 14 L. T. (N. S.) 599.

Q. B. Div. 1899.

DEVONSHIRE *Appellant;* DROHAN, *Respondent.*

Ronan, Q.C., and *Conner, Q.C.* (*Healy, Q.C.*, with them) for the respondent :—

As to the certificate, the views of the majority of Judges of the Queen's Bench (Whiteside, C.J., and George, J.), upon the former case stated, bear out the contention that the certificate (even if receivable in evidence at all) is no bar, and does not preclude the Justices from adjudicating on the facts before them; and the opinion of Lord Fitz Gerald, then Fitz Gerald, J., who there dissented, does not really conflict with that view, for he decided merely that the certificate was conclusive "as of the day when it was made"; and therefore did not express any opinion that—if circumstances altered, if from natural causes or from interference by the owner, the stream changed its course, or direction, or if "the deepest part" was no longer so—the Justices would still be bound to assume as fact what was proved in fact to be untrue.

The authority of the Special Commissioners under the Act of 1863 superseded, and in many respects differed from that of the Commissioners of Public Works under the Act of 1842. The Commissioners of Works were empowered (*inter alia*) to abate (section 21) weirs and fixed nets injurious to navigation, and also (section 41) to determine, in "cases of dispute," any matters arising in connexion with the regulations then enacted as to free gaps; to enforce the making of free gaps in accordance therewith; to assess the compensation payable (section 42, *et seqq.*); and further (section 59) where the owner neglected to alter a weir ". . . so as to make the same conformable to the provisions of this Act or to the orders and regulations of the said Commissioners," to direct the opening of, and themselves to open, a sufficient free gap therein, &c. Compensation was abolished. The authority of the special Commissioners under the Act of 1863, who were appointed for a limited time only, was conferred by enactments of a less tentative character; and in regard to "fishing weirs" (as distinguished from "fixed nets") was an authority simply and solely to condemn. They *shall* (section 5) abate and remove all *fixed nets* injurious to navigation, "and shall inquire into the legality of, and, if satisfied of their illegality, remove" all other (illegal) *fixed nets;* and (section 6) if satisfied that a *fixed net* is legally erected may certify to that effect, stating the situation,

size, and description of the net, this certificate being made "conclusive evidence" (not that the net was in all respects legal), but "that the person therein named is the person specified" by the 5 & 6 Vict. c. 106, "as entitled to the right therein given;" but, even so, the certificate "shall not render any net legal that would be otherwise illegal by reason," &c. Thus, even in the case of a "*fixed net*" it would be competent to the Justices to impose a fine on the ground (*e.g.*) that it was injurious to navigation, although this matter must have been considered by the Commissioners when issuing a certificate of legality,—the certificate being in effect rather an authority to fish, free from penalty, than an effective declaration as to the status of the fixed engine. But, as to fishing weirs (section 7) there was no power given to grant any certificate; the authority was simply to "inquire into the legality of all fishing weirs," and to remove such as were illegal, subject to the exception where an undertaking was given to make a legal free gap. They had no jurisdiction to affirm the legality, but only in proper cases to condemn the illegality of a weir, and to prostrate it, its "legality" being thus merely an "incidental matter": see FitzGerald, B., in *Devonshire* v. *Foot* (1). A decision by these Commissioners that a weir or gap was legal was therefore no more than a negative finding—that illegality was not proven before them. If they found that the weir was illegal, then its removal followed. An order of condemnation might, no doubt, be in every respect similar to a judgment *in rem*, and the *Lax Weir Case* (2) decides no more than this; but it does not thence follow that a refusal by the Commissioners to condemn was to preclude either that body or any other competent tribunal from dealing with future complaints of illegality. *Devonshire* v. *Foot* (1) (in S. C.) may be said to be a decision merely that prohibition was not an appropriate remedy; but it is submitted that an examination of the reasons given in the judgments support strongly the view that it was open to the Justices to decide upon the alleged illegality notwithstanding the "certificate" of 15th February, 1866.

It is submitted therefore that the Justices in the present case

(1) Ir. R. 2 C. L. 514. (2) Ir. R. 2 C. L. 519, n.

Q. B. Div. 1899.

DEVONSHIRE *Appellant*; DROHAN, *Respondent*.

had jurisdiction to convict for not making a free gap in the weir in accordance with the provisions of the Act of 1863.

But, even if not, they had already, it is submitted, jurisdiction, and were bound on the facts as found by them, to convict for non-maintenance in the several particulars mentioned in the summons. If the river grew wider, the gap must be made wider; if deeper the gap must be made more deep; if the deepest part of the stream alters, the gap must, as required by the statute, be put in the deepest part of the stream; if, either from natural causes or the intervention of human agency—here the acts of the weir-owners themselves—the direction of the stream is altered, the sides of the gap must from time to time be altered so as to be parallel thereto.

[Counsel also referred to and discussed *Westropp* v. *Commissioners of Public Works* (1).]

Cur. adv. vult.

June 19.

PALLES, C.B. :—

Many questions were elaborately discussed during the argument, but, in the view which I take of it, a decision upon two will be sufficient to determine the validity of the adjudication of the Justices. Those two questions are:—1, whether the judgment of the 15th February, 1866, of the Special Commissioners of Fisheries appointed by the Act of 1863, was a final and conclusive adjudication that previous to or upon that day a legal free gap had been made in the weir in question. If this question be determined in the affirmative, then the Justices ought to have acquitted the appellants upon the first ground of complaint, and their conviction and imposition of penalties, amounting to £1000, on that cause of complaint must be reversed. 2. The second question is, whether the Justices, having regard to such of their findings of fact as are supported by the evidence, were right in declining to convict upon the second cause of complaint.

These two questions are wholly distinct and independent, and must be dealt with separately.

In approaching the first question, viz. the character of the adju-

(1) [1896] 2 Ir. R. 93.

dication of the 15th February, 1866, the first matter for decision is, are we at liberty to enter upon it at all? The respondent insists that we are not; he says that that question was determined in the negative by this Court upon the 12th June, 1868, in respect of this very weir and gap, in *Devonshire* v. *Foot* (1); and that that decision was affirmed by the Exchequer Chamber, by their judgment in the action for a prohibition, which was delivered upon the 23rd November, 1872 (2).

I take first the judgment of the Exchequer Chamber, and I am clearly of opinion that it in no wise determined the question here. That, as I have said, was an action in prohibition, to prevent the Justices proceeding to act under their order which had been affirmed by the Queen's Bench; and the only question for determination there was whether a writ of prohibition lay in such a case. The right to such a writ would have been negatived by either of two views of the law: first, that irrespective of the consideration of the legality of the order of the Justices, the case was one in which such a writ did not lie; secondly, that the order of the Justices was legal. The record does not, and could not, show upon which of these two grounds the decision of the Exchequer Chamber proceeded; and if we pass from the record itself to the shorthand notes of the judgment, it is clear that some (it appears to me the majority) of the Judges based their decision upon the first ground. It is, however, sufficient to say that it does not appear that the decision of the majority of the Court was not based upon the inapplicability of a writ of prohibition to such a case. It is plain that the judgment of Monahan, C.J., went solely upon this ground. He says (3):—

"The only question is, had the inferior Court jurisdiction to hear and determine the case? If they had jurisdiction to hear and determine the case, no matter how erroneous their decision may be, though the party may or may not have his remedy, according to the circumstances of the case, and according to the provisions of the Act which gives the magistrates jurisdiction, it is not a case for a prohibition merely because they have come to an erroneous decision in a case in which they had jurisdiction. Therefore it occurs *to us* that in this case all *we* have to inquire into is whether the magistrates had jurisdiction to determine the complaint made before them, and whether, on the investigation

(1) Ir. R. 2 C. L. 514. (2) *Devonshire* v. *Foot*, reported *infra*, p. 211.
(3) *Infra*, p. 217.

Q. B. Div. 1899.

DEVONSHIRE *Appellant*; DROHAN, *Respondent*.

Palles, C.B.

of the complaint, as soon as it appeared that this gap was in the same position and this weir was in the same position as it had been at the time of the granting of the certificate, they should have stayed their hands, and not decided either one way or the other, but determined that they had no jurisdiction to go further. Because, if they had jurisdiction to go further, whether they went right or wrong on that further journey, it still may be a case for an appeal, when an appeal lies on a statement of the case or otherwise; but it is not a case for a prohibition. . . . It was not suggested in argument that the complaint originally was not within the jurisdiction of the magistrates, and, therefore, that the magistrates had not a right to entertain the complaint. . . . It was not . . . substantially questioned, but that they had a right to determine whether it was true in point of fact that the Commissioners had made the award which it is stated in the pleadings that they made, and also whether the further allegation was true, that things remained as they were since the making of that award. Therefore, *ex naturâ rei*, they must have had jurisdiction to make that portion of the inquiry. Well, then, if they had jurisdiction to make a portion of the inquiry as to the validity of these defences, the question is, what is there in this Act of Parliament to stop them there? *We* are of opinion that there was nothing to stay their hands; but that it was their duty then, having ascertained what the facts were, to decide as best they could the matter of law that then arose before them. The matter of law that was argued before them was, that, inasmuch as these Commissioners were a Court having jurisdiction to do a great many things, and having jurisdiction to determine that this was an illegal weir, no magistrates could call in question the propriety of such their determination. It has been said that there was conclusive evidence that everything was right. Well, I can only say that if it be conclusive evidence that this weir was right, and if this weir at the time of being right was not in accordance with the Act of Parliament, it was conclusive evidence of a false conclusion of fact; but that—in the view that *I take, and the majority of the Court take*—is quite immaterial. Wherefore, as far as I am concerned, I do not enter into that question at all, and I am to be distinctly understood as not entering into the consideration of the question whether the magistrates came to a right or a wrong decision on the merits of the case."

Later on, the Chief Justice, after stating that Mr. Justice O'Brien, who was present at the argument, concurred in the judgment he had pronounced, and substantially in the reasons which he had assigned for it, added (1)—

"I believe I may say that we all agree in this result. It may be that *some other* members of the Court may have come to that conclusion by a different route, and that they may, perhaps, state their own particular views and reasons."

(1) *Infra*, p. 220.

These words leave it quite uncertain on what grounds the other members of the Court proceeded.

Mr. Justice Keogh added (1) :—

"As this decision can be appealed from, I hope that this case will be carried further, in order that, in the House of Lords, the jurisdiction of prohibition exercised by the Chancellor may be established if it exists, but condemned for ever if it be, as I believe it is, utterly indefensible."

The judgment of Baron Fitz Gerald was based on the ground that the adjudication of the Commissioners was not a judgment *in rem*, and consequently that the decision of the Justices was right. He was of opinion, as I understand his judgment, that the line of cases as to prohibitions to ecclesiastical Courts, of which *Gould* v. *Gapper* (2) is an example, established that if the judgment of the inferior tribunal was based upon a misconstruction of a statute, a prohibition might issue after judgment; and he proceeds (3) :—

"Upon this record I cannot persuade myself that the question for us is any other than whether the order on appeal is a proper bar or estoppel. I find myself, then, unable to dispose of this case without determining what I have called the substantial question raised by the declaration—that is to say, whether proof of the facts therein alleged did oust the jurisdiction of the Justices?"

He accordingly proceeds to consider that question, and determines it in the negative.

The Chief Baron, after expressing his strong opinion that the jurisdiction to issue a prohibition under circumstances such as those then before the Court was in full force, says (4) :—

"I concur in the judgment of the Chief Justice, and *for his reasons*. A great deal of what Baron FitzGerald had stated I also concur in.

Without referring at greater length to these judgments, the result which I have arrived at, from a consideration of all of them, is that the majority of the Court based their judgment upon the ground that, whether the order of the magistrates

(1) *Infra*, p. 221.
(2) 3 East, 472; 5 East, 345.
(3) *Infra*, p. 228.
(4) *Infra*, p. 232.

Q. B. Div. 1899.

DEVONSHIRE *Appellant:* DROHAN, *Respondent.*

Palles, C.B.

were right or wrong, prohibition did not lie; but that the minority, consisting of Mr. Baron Fitz Gerald, probably Mr. Baron Deasy, and, possibly, some other members of the Court, held that the decision of the magistrates was right. This, however, is so uncertain as not to be a safe ground for decision, and I accordingly base my judgment upon this, that it is consistent with all that appears that it was decided on the first ground.

This is the only case in which the matter was considered in a Court superior to the Queen's Bench.

There is, however, still the judgment of the Queen's Bench itself. I do not occupy time by analysing the effect of the distinction between the complaint under consideration there—an informal complaint for not maintaining a gap—and the complaint here, which is for not making the gap; because, on two distinct grounds, I hold that the former decision is not (and even had it been upon a complaint worded as is the present, would not be) conclusive upon us.

First, it was a decision upon a case stated; a jurisdiction possessed by the former Courts of Common Pleas and Exchequer, in common with the Queen's Bench, and in the exercise of which there not only might be, but frequently were, opposite decisions upon the same identical point, and from none of these conflicting decisions could there be an appeal as the law then stood. A new Court, such as the present Queen's Bench Division, cannot be bound to follow the decisions—probably conflicting—of each of its former constituent Courts. Even the Queen's Bench itself before the Judicature Act held that it was not bound by a decision under this jurisdiction: *Lutton* v. *Thompson* (1); *Coulter* v. *Martin* (2); and shortly after the Judicature Act, it was held in England that the Court of Appeal established by it was not bound by a previous decision of the former Court of Appeal in Chancery.

The second ground upon which I am of opinion that we are not bound by the previous decision is that the case before us is one from which (being a criminal one) there is no appeal. In reference to the binding effect, in a case of this character, of previous

(1) Ir. R. 10 C. L. 10. (2) Ir. R. 11 C. L. 477.

decisions, even of the same Court, I believe the law to be accurately stated by Bovill, C.J., in *Hadfield's Case* (1), which was an appeal under the Voters Registration Acts.

"I do not concede that we are absolutely bound to adhere to our decisions in the same manner as the House of Lords considers itself bound. There is no parallel between the two cases. The decisions of the House of Lords, as the Supreme Court, and Court of ultimate appeal, are decisions upon the law, not pronounced simply by lawyers, but by the whole House of Peers; for it is only in modern times that they are pronounced by a select number of the members of the House. The law seems, from the cases referred to, to be clearly settled that the decisions of the Lords are final and binding on the House itself in future cases. That principle, however, has never been applied to the superior Courts of Westminster in cases where they have a peculiar jurisdiction; for instance, in the Queen's Bench on appeals from Quarter Sessions, in the Exchequer in matters of Revenue, and in this Court on appeals under the Registration Acts and in matters arising under the Railway and Canal Traffic Act. Wherever a new jurisdiction is given to the Courts, some time must necessarily elapse before the law can be settled; and great inconvenience and mischief would result in such cases, where there is no appeal, if the Courts were absolutely bound by their decisions, though manifestly erroneous."

The same doctrine was held, and was for many years acted upon by the Court of Appeal in this country when hearing registration cases.

Thus I am driven to consider the question of the effect of the adjudication upon its merits. That question depends upon the true construction of the 7th section of the Act of 1863, read in the light of the entire Act, 26 & 27 Vict. c. 114, and of the code of the Irish Fishery Acts of which it forms part. The only part of that code, prior to the Act of 1863, to which I think it necessary to refer, is the 41st section of the 5 & 6 Vict. c. 106. I do so because in it is to be found the *genesis* of this section, and because there is an important decision upon that section which I deem material here. This 41st section enacts that in all standing weirs extending more than half way across any river a free gap shall be left or formed: 1, in the deepest part of such river; 2, constructed so that its sides should be in the line of and parallel

(1) L. R. 8 C. P. p. 313.

Q. B. Div. 1899.

DEVONSHIRE, *Appellant*; DROHAN, *Respondent*.

Palles, C.B.

to the natural direction of the stream of such river; 3, so that the bottom thereof should be level with the natural bed of such river above and below such gap; and, 4, that its width should not be less than certain specified dimensions, which vary according to the width of the river. Power was then conferred on the Commissioners of Public Works "in cases of dispute relative to any of the matters aforesaid" to determine the same; and penalties not exceeding £50 and £5 a-day were imposed on the person possessed of the fishing of any weir for omission or neglect "to form such free gap, *of the dimensions or in the place, or . . . in the manner hereinbefore required.*" The section concluded with a proviso that a person lawfully possessed of any weir in which by law no such free gap could previous to the passing of this Act be enforced to be made, should not be liable to any such penalty . . . until his claim for compensation for the loss thereby sustained should be settled and disposed of, and the amount of compensation, if any, paid, tendered, or lodged, according to certain subsequent provisions in the Act.

This was the operative section down to the passing of the Act of 1863; and it is to be observed that, excluding the provision for compensation, it contained three distinct enactments:—

First, that a free gap should be constructed in a prescribed part of the river, in a prescribed direction, at a prescribed level, and of a prescribed width; and in this respect it is *in pari materiâ* with section 9 of the Act of 1863.

Secondly, that disputes relative to the matters aforesaid should be determined by the Commissioners. This provision is *in pari materiâ* with section 7 of the Act of 1863.

Thirdly, it imposes penalties for the omission or neglect to form a gap of the dimensions, or in the place, or in the manner prescribed. This third provision is *in pari materiâ* with section 12, sub-section 1, of the Act of 1863.

Now, before the passing of the Act of 1863, the meaning and effect of this 41st section was considered by the Queen's Bench in *The Queen* v. *Commissioners of Public Works* (1). That case

(1) Ir. R. 2 C. L. 519, note; Reports of Fishery Cases, 1.

came before the Court upon a motion to make absolute a conditional order for a writ of prohibition, obtained by the proprietor of the Lax Weir at Limerick, to restrain the Commissioners from further proceeding with a determination pronounced by them in which they directed a new gap to be opened in that weir, the existing gap not being, in their opinion, in accordance with the requirements of the law. Amongst other grounds upon which the writ was there sought, it was insisted that the Commissioners had exceeded their jurisdiction by deciding not only that the gap, as it then stood, was not conformable to the Act, but that they had stated how it should be made conformable to the Act. The case was heard and decided by the then full Court of Queen's Bench, consisting of Lefroy, C.J., O'Brien, Hayes, and Fitz Gerald, JJ. The Chief Justice, in his judgment, entered fully into the nature and character of the jurisdiction of the Commissioners, and of their adjudication. He says:—

"The 5th and 6th of Victoria was an Act introduced upon a repeal of all the Salmon Fishery Acts which had pre-existed; and this Act imported to provide a system by which for the future, from the day of the passing of the Act, the Salmon Fisheries in the rivers of Ireland of certain dimensions should be regulated—and the manner in which the weirs in rivers of certain dimensions should be left or formed, or altered, where they pre-existed, in such river. . . . The Act says, if there be any dispute—dispute between whom? Between the Conservators, who act on the part of the public, and who are interested on behalf of the public in having these Queen's gaps kept according to the Act,. and the owners of the fisheries, whose interest it would be, if they could, to stop the gaps altogether; but if there was any dispute as to the compliance with the statute of the existing gaps, they were to be made or altered, so as to conform to the requirements of the Act. All this, of course, is necessary, the Act not purporting to be a provision for one single time, but purporting to make a provision for the future. If any dispute should arise between these parties, it was most important that there should be a tribunal constituted that should, from its peculiar competency, be the tribunal to determine those disputes—namely, what the state of any given weir was with respect to the provisions of this Act, whether it had a Queen's gap, and whether that Queen's gap was conformable to the requirements of the Act, and, if it were not, to adjudicate upon and point out that imperfection—to ascertain those defects and departures from the requirements of the Act, so that it might not be scrambled for before a jury, with a host of witnesses contradicting one another, but that a tribunal competent to make a decision on the subject should be invested with authority so to adjudicate. . . . The Commissioners came to

Q. B. Div. 1899.

DEVONSHIRE, *Appellant*; DROHAN, *Respondent*.

Palles, C.B.

an adjudication which was literally not merely a determination, but *was in fact a judgment in rem*, like the judgments formerly pronounced by the Commissioners of Revenue. When the Revenue laws were violated, there was a judgment *in rem* before the Commissioners. Here the Commissioners have pronounced a judgment *in rem* with all the solemnity that belongs to a judgment, and accordingly provision was made for recording the judgment. It is a perfect judgment *in rem*, and therefore conclusive upon the parties."

As to the objection that the Commissioners had on a previous occasion, and by a previous act of theirs, exhausted their authority, the Chief Justice says:—

"If it was important for the public that the gap should be made with certain measurements and levels, it is most important that there should be a tribunal so perfectly fitted to investigate the subject from time to time, and to be a mediator between the conflicting parties—the public on the one hand, and those who wish to monopolise on the other—a mediator perfectly indifferent to both, invested by the Legislature with that mediation; and when they made their adjudication, that it should be held conclusive as to the circumstances and nature of the recital contained in it. . . . I think it was made an objection that, although the Commissioners had authority to say that the gap was not conformable to the Act, it was an excess of their authority to say in what particulars it was not in conformity with the Act. Well, I think they would have fallen short of their duty, and greatly have mocked the duty imposed upon them, if they had rested content simply with the declaration that the gap was not in conformity with the Act of Parliament. They proceeded to do that which beyond a doubt they had authority to do—namely, to specify the particulars in which it was not in conformity with the requirements of the Act. It was substantially within their authority to do so."

The learned Lord Chief Justice then proceeded to say that, "If there were anything wanting to remove the possibility of a doubt upon the subject, the 22nd section of the 13 & 14 Vict. c. 88, put an end to it." This section enacted that if any person who was entitled to a weir, and was not exempted from making and maintaining a free gap in it, should omit or neglect to have or maintain a free gap of the dimensions, or in the place, or to construct it in the manner now provided by law, the Commissioners might cause the alterations to be made, and recover the expenses from him.

I may remark here that this reference of the Chief Justice to the Act of 13 & 14 Vict. c. 88 was to support the view of the Court that the Commissioners had not exceeded their duty by stating how

the weir should be made conformable to the Act. He did not rely on it to show that the adjudication of the Commissioners was a judgment *in rem*. But, even if it were material upon the latter question, the statute was relied on only to confirm a view which the Court held would have been sufficiently clear without it. I refer to this as it will be hereafter seen that it was upon this point that Whiteside, C.J., differentiated the *Lax Weir Case* (1) from *Devonshire* v. *Foot* (2).

This judgment was given upon the 12th June, 1861; and the state of the law declared by it must be taken to have been before the Legislature when it passed the Act of 1863 (26 & 27 Vict. c. 114), to the consideration of which I now come.

It is plain, from reading that Act, that its object was to impose more stringent regulations upon owners of weirs, nets, and fisheries. Its effect upon sect. 41 of the Act of 1842 has been held to be to impliedly repeal it; but if it did so repeal it, it, by the 7th, 9th, and 12th sections substantially re-enacted it, with variations, and applied it as so re-enacted to an extended subject-matter.

It appears to me to be important to have a clear apprehension of what those alterations are:—

First, then, it extinguished the right to compensation of the owners of weirs in which by law a free gap could not be enforced previously to the passing of the Act of 1842.

Secondly, it extended the enactment to weirs which did not extend more than half-way across a river. The effect of these two provisions was to make the enactment applicable to all weirs.

Thirdly, it vested the jurisdiction of the former Commissioners in the Special Commissioners appointed under the Act; and enabled them to proceed upon their own initiative, instead of waiting for a complaint to be made to them.

Fourthly, it altered the width of the gap, prescribing that in its narrowest part it should not be less than one-tenth of the width of the stream; but, in all other respects, the new provisions as to the place of the gap, the direction of its sides, the level of its bottom, are identical with the old.

The remaining provision of the 41st section of 5 & 6 Vict. c. 106

(1) Ir. R. 2 C. L. 519, note. (2) Ir. R. 2 C. L. 514.

Q. B. Div. 1899.

DEVONSHIRE, *Appellant*; DROHAN, *Respondent*.

Palles, C.B.

was "that in cases of dispute relative to any of the matters aforesaid, the same shall be determined by the Commissioners." In substitution for this jurisdiction in the former Commissioners, the Special Commissioners are in the 7th section invested with a much more responsible and extended power and jurisdiction.

Contrasting the provisions of the Act of 1863 with the 41st section of 5 & 6 Vict. c. 106, I should have thought, were there no decision to the contrary, that every element to be found in the former Act which constituted an adjudication of the old Commissioners a judgment *in rem*, had its corresponding element in the Act of 1863; and that, as Parliament must be taken to have legislated on the basis that the 41st section of 5 & 6 Vict. c. 106 bore the interpretation placed upon it in the *Lax Weir Case* (1), it necessarily followed that the adjudication of the Special Commissioners under sect. 7 of the Act of 1863 must also be a judgment *in rem*. The decision, however, of a majority of the Queen's Bench in *Devonshire* v. *Foot* (2), and the approval of that decision by Mr. Baron FitzGerald in the action for the prohibition, render it necessary for me to consider the matter more fully.

I take it that it will not be contested that an adjudication pronounced upon the *status* of any particular subject-matter by a tribunal having competent authority for that purpose, is a judgment *in rem*; and further, that such an adjudication, being a solemn declaration from the proper and accredited quarter that the *status* of the thing adjudicated upon is as declared, concludes all persons from saying that the *status* of the thing adjudicated upon was not such as declared (3). Now, the 7th section of the Act of 1863 provides that, subject to the appeal in the Act mentioned, the Commissioners shall inquire into the legality of all fishing weirs throughout Ireland, and shall remove such as are in contravention of any Act of Parliament or law in force in Ireland; with this qualification, that where a fishing-weir is illegal, only by reason of its not having a free gap as required by law, this section shall not empower the Commissioners to remove such fishing-weir, if an undertaking be entered into, *to the satisfaction of the Commissioners*, by the owner or other person

(1) Ir. R. 2 C. L. 519, note.
(2) Ir. R. 2 C. L. 514.
(3) 2 Smith's L.C., 7th Edition, 785; (per Collins, L.J., and Mr. Arbuthnot.)

interested in such weir, to make a legal free gap therein within a time to be prescribed by the Commissioners, and if a free gap is made accordingly. By sect. 13, before removing any illegal weir, the Commissioners are to summon the parties interested, to hear them, and any evidence they may produce; and a summons issued by them is to be deemed to be equivalent to a complaint. Under the 14th section any person aggrieved by any *decision* of the Commissioners (and a dismissal of a complaint is to be deemed a decision) may appeal to the Queen's Bench; and by subsect. 13 of that section, the decision of the Queen's Bench, unless the Court otherwise directs, is to be final. By the 35th section, *warrants* for the removal of illegal weirs are to be signed by two at least of the Commissioners.

Under these provisions the Commissioners had jurisdiction to inquire into the legality of the Lismore Weir; and having found, as they did, that it was illegal only by reason of its not having a free gap as required by law, it is admitted that they had jurisdiction to take an undertaking, from the persons interested in the weir, to make a legal free gap therein, and to prescribe the time for making the same. But, in my opinion, they had a further power, because the undertaking to be entered into was one which was to be "*to their satisfaction*"; and those words must be construed, having regard to the subsequent duty which is impliedly cast upon them; viz. of determining, at a later period, whether a free gap has been made "*accordingly*": that is, according to the undertaking. Although it is not necessary to decide the point, my opinion is in accordance with that of the late Lord FitzGerald (1), that, under these words, they have the power which the Commissioners of Public Works were in the *Lax Weir Case* (2) held to have, of prescribing the particular manner in which the gap should be made so as to be conformable with the Act, viz. to prescribe the place at which it should be made, the level of its floor, and the direction of its sides. No doubt, however, compliance with these directions would be of no avail unless there were a subsequent adjudication by the Commissioners that the gap, as actually constructed, was legal.

(1) Ir. R. 2 C. L. p. 535. (2) Ir. R. 2 C. L. p. 519, n.

Q. B. Div. 1899.

DEVONSHIRE, *Appellant*; DROHAN, *Respondent*.

Palles, C.B.

Before passing from the powers of the Commissioners, it is right, in consequence of the opinion of Whiteside, C.J., that their jurisdiction ceased as soon as the undertaking had been given—an opinion which he makes the basis of his judgment—to refer to a sentence in the judgment of Monahan, C.J., in *Devonshire* v. *Foot* (1), which, to my mind, accurately determines the extent of their jurisdiction, and which is in direct antagonism with the opinion of Whiteside, C.J.:—

> "It also appears" (says the Chief Justice) "from the latter part of the same section, that the Commissioners also had authority to examine the weir when it should be so completed, and ascertain whether it was a legal weir; because the Act provides that they might take the undertaking, and also that they were to determine whether the free gap had been made accordingly. Accordingly no doubt they had jurisdiction, and they were right to determine in fact, that this gap has been made in pursuance of the undertaking of the Duke, and to determine that this was a proper weir at the date of their certificate."

No doubt the section does not, in words, say that the Commissioners are to *determine* whether the "legal free gap" has been made; but as a duty is cast upon them to remove all illegal weirs; as this duty arose in reference to this particular weir, which they found was illegal; as their duty to remove it could not cease to exist until the weir had become legal by the making of a legal free gap; as the parties had a right to have a *decision* on this question one way or the other, and, as being an inferior jurisdiction, they were obliged to state the facts which gave them jurisdiction to make any decision which they in fact made—it appears to me clear that, in any order declining to direct the removal of the weir because they had determined that the free gap had been made according to the undertaking, the Commissioners were bound to record the fact that it had been so made, as their reason for not making the order which, in the absence of this new fact, they would have been in law bound to make, viz. an order for removal. If I am right in this, they necessarily had jurisdiction to determine that the gap actually made was a legal one.

Now the question is, is their decision that the weir was legal a judgment *in rem*? Unquestionably, it was an adjudication by a tribunal having competent authority for the purpose; and equally

(1) *Infra*, p. 216.

unquestionably, it was pronounced upon the legal *status* of the weir. It is admitted that, had the ultimate determination of the Commissioners been that the weir was illegal, it would have been an adjudication *in rem*. I admit, however, that even in the case of a judgment *in rem*, a distinction may be drawn between a judgment of condemnation and one of acquittal. The first is affirmative, and must depend upon a state of facts actually proved. The other, the acquittal, in some cases may depend upon the absence of proof. If the section had been differently worded, an acquittal under it might have been consistent with a judgment, not that the weir was legal, but that it had not been proved to be illegal.

As to a judgment being conclusive only as to the point decided, there is, as stated by Smith, L.J., in *Ballantyne* v. *M'Kinnon* (1), no distinction between a judgment *in rem* and a judgment *in personam*; the real distinction between the two is that, in the one, the point adjudicated upon, which, in a judgment *in rem*, is as to the *status* of the *res*, is conclusive against all the world as to that *status*; whereas, in the other, the point, whatever it may be, which is adjudicated upon, it not being as to the *status* of the *res*, is only conclusive between parties or privies.

But, in cases under s. 7 (2), a sentence of acquittal—where there has been a determination that the weir is illegal only by reason of its not having a free gap—cannot depend upon any defect in proof. The preliminary finding of illegality throws the *onus* upon the owner of the weir. He must not only make the free gap; but he must affirmatively prove, to the satisfaction of the Commissioners, that he has done so; and it is their *decision*, that it has been "*made accordingly*," that renders legal the weir which previously was illegal. Such a decision, depending as it does upon affirmative proof, differentiates the acquittal which ensues from it from acquittals depending upon absence of proof.

I now come to ascertain what was "the point decided." The jurisdiction of the Commissioners to inquire attached as soon as they issued their summons. The ultimate purpose of their judicial inquiry was to determine whether or not they should issue their warrant for the removal of the weir, but the *subject-*

(1) [1896] 2 Q. B. 445, 462. (2) 26 & 27 Vict. cap. 114.

Q. B. Div. 1899.

DEVONSHIRE, *Appellant*; DROHAN, *Respondent*.

Palles, C.B.

matter of their inquiry was its legality or illegality—a matter which in law could depend solely on the gap being legal or illegal. Their only *ultimate decision* therefore could be one as to the legality or illegality of the gap. Their direction to remove the weir, if they determined it to be illegal, would be no more than the sentence which the statute prescribed for the illegality ascertained by their previous judgment. Their warrant would be no more than their formal authority to their officer to execute that sentence. Dividing the matters to be considered by the Commissioners into the two classes into which similar matters were divided by the Exchequer Chamber in *Bunbury* v. *Fuller* (1), viz. those collateral to the merits which go to the jurisdiction of the Commissioners and the merits themselves, I hold that the legality of the weir contributed "*the merits*"; that the question of its legality arose, not incidentally but directly; that it was the *very point* in controversy before them, the *very point* decided; and that their determination upon it is judgment *in rem*, and conclusive against all the world.

I have stated my views on this point at such length, because as to it they conflict with the opinion of my most esteemed late colleague, Mr. Baron Fitz Gerald, who held that the legality of the weir was a "matter merely incidental"; but they are in accordance with the judgment of Lord FitzGerald in *Devonshire* v. *Foot* (2), and with that of Lord O'Hagan in *Ex parte Devonshire* (3).

The effect of a contrary decision is pointed out very strikingly by both these learned Judges. I quote from Lord FitzGerald (2):—

"It is a necessary consequence, from taking the respondent's view of the case, that, even though the Commissioners, on the 15th February, 1866, determined that there was in his weir a legal free gap, the respondent might, on the following day, have issued a summons against the Duke of Devonshire for not having a legal free gap in his weir; and two magistrates sitting in Petty Sessions might have, in effect, reversed the decision of the Commissioners, and imposed a penalty on the Duke, although he had done everything to carry out the directions of the Commissioners, and to comply with the Act of Parliament. Suppose, then, the Duke of Devonshire altered his weir to

(1) 9 Exch. 140.
(2) Ir. R. 2 C. L. p. 639.
(3) Ir. R. 3 Eq. 412; Ir. R. 5 Eq. 314.

protect himself from further penalties, the Commissioners might come down, declare the weir illegal, and require him to restore it to its former condition under penalty of abatement; and the contest between these tribunals, possessing a concurrent jurisdiction, might go on indefinitely."

I adopt the *ratio decidendi* of that learned Judge (1):—

"In my opinion (he says), when the Commissioners decided that this weir was a legal weir, and that it conformed with the requirements of the statute, and made an order to that effect, they did what they had full authority to do. For it seems to me that, where the Legislature had created a special tribunal of this kind, and conferred upon it jurisdiction to determine certain questions, the judgment of that tribunal, unappealed from, on questions coming within its jurisdiction, is final and conclusive in the mode I shall point out. I do not say it is final in this sense, that the magistrates might not, at a future time, and *under a change of circumstances*, have jurisdiction to determine whether the free gap was or was not in accordance with the requirements of the statute; All I mean to say is this, that the order of the Commissioners was final and conclusive on the day on which it was pronounced."

I must now refer to the judgments of Whiteside, C.J., and George, J., who constituted the majority of the Court, in *Devonshire* v. *Foot* (1), and who arrived at a different conclusion.

The Chief Justice does not hold that the *Lax Weir Case* (2) was wrongly decided. On the contrary, he said:—"I think that case was good law . . . so long as the Commissioners had the power to execute the works themselves" (3); but he held that the law as there expounded was not applicable, in consequence of the alteration effected by the statute of 1863, on the ground that before the Act the works might be executed by the Commissioners themselves, whereas, since the Act, they were executed by the owner himself, at the risk of the removal of his weir, if they did not meet with the satisfaction of the Commissioners. I have already endeavoured to show that this circumstance cannot alter the character of the determination as to legality or illegality.

The ultimate ground of the judgment of the Chief Justice is expressed in these words (4):—

"What the Commissioners are to do, is to take his undertaking that he will make a legal free gap within the time prescribed by them; *but they have no further power under the Act*."

(1) Ir. R. 2 C. L. 514, p. 536.
(2) *Ibid.*, p. 519, n.
(3) Ir. R. 2 C. L. p. 531.
(4) *Ibid.*, p. 532.

Q. B. Div. 1899.

DEVONSHIRE, *Appellant*; DROHAN, *Respondent*.

Palles, C.B.

This *ratio decidendi*, I have endeavoured to show, has been held erroneous by the Exchequer Chamber.

The reasons of George, J., are not identical with those of the Chief Justice. He held (1) that the Commissioners had jurisdiction, after the gap had been made, to inquire whether it was in accordance with the Act; but he held that, if the doctrine of estoppel were to be applied in the case at all, it could only be as between the Commissioners and the Duke of Devonshire. His *ratio decidendi* is this (2):—

"I have failed to see how . . . it can be contended that the provisions of the 12th section have been abrogated and annulled. The 9th section says that the gap shall be made in a particular manner; and the 12th section says that if the gap be not made in that manner, the owner will be liable to the penalties therein mentioned. It is not disputed that the floor of this gap is at this moment higher than the natural bed of the stream; and, though, at the time it was made, it may have been in conformity with the Act of Parliament, it is perfectly manifest that, as it existed on the 1st of October, 1866, the sill of the gap was above the level of the bottom of the river . . . I presume that what the Legislature intended was to protect the public, not only against the acts of the weir owners, but against improvident orders of the Commissioners."

It seems to me that the answer to this reasoning is that it was not pretended that the 12th section had been abrogated or annulled; but that, so far from it not being disputed that the floor of the gap was, at the moment, higher than the natural bed of the stream, it should have been conclusively deemed not to have been so, because evidence could not be received to that effect, as it was admitted that no alteration had been made since the adjudication of the Commissioners; and that adjudication was final. It is illogical, in a case of estoppel, first to determine the fact to be that which you are estopped from alleging it to be, and on this determination to raise an antagonism between the alleged truth and that which you are estopped from denying. Thus, in truth, Mr. Justice George's judgment cannot be sustained except upon the ground that the estoppel was between the Commissioners and the Duke of Devonshire only; and it has not been, and could not have been, contended that he was right in this.

(1) I. R. 2 C. L. p. 543. (2) *Ibid.*, p. 544.

For these reasons, I am of opinion that the appellants ought to have been acquitted upon the first ground of complaint, and and that the conviction upon it ought to be quashed.

The second question,—whether the Justices, having regard to such of their findings of fact as are supported by the evidence, were right in declining to convict upon the second cause of action,—can be disposed of in a few words.

My previous reasoning will show that I am of opinion that, as the width of the gap and the level of its floor are the same now as when it was erected, and as it has not been shown that there was any change in the level of the natural bed of the river, a conviction on this complaint could not be had by reason of any allegation that the level of the floor or the width of the gap are not in accordance with sect. 9.

The case, however, in paragraph 8, finds as follows:—

"The sides of the gap have not been maintained in a line with and parallel to the direction of the stream at the weir. It was proved for the complainant that, *since the gap was constructed, three hatches* in the south wall of the weir *had been filled up*. The effect of this, it was proved, was to throw the flow of the water to the north side of the weir, causing shoals to form on the north side of the south wall, and to scour away an island which was in front of the tail hatch. The result of this has been to diminish, from time to time, the tendency of the stream to divert from north to south opposite the gap, and to cause it to continue its flow from west to east, so that the *sides of the gap are no longer parallel to the direction of the stream at the weir.*"

It is admitted that the evidence sustains this finding of fact. The weir maintained, therefore, has not been the weir which has been adjudged to be legal, and the gap in this weir is not in accordance with sect. 9, as its sides are not parallel to the new direction of the stream—*a new direction caused by the defendant's act* in maintaining the weir as altered. In my opinion the fact thus found amounts, in law, to an omission to maintain the gap in accordance with the Act. I am, therefore, of opinion that the case ought to go back to the Justices, with a direction to them to convict upon the second complaint.

Each party should abide his own costs of and incident to the case stated.

Q. B. Div. 1899.

DEVONSHIRE, *Appellant*; DROHAN, *Respondent*.

O'BRIEN, J.:—

The first question we have to decide, arising on the complaint for not having a free gap, is whether what happened in 1865 amounts to a determination for all time that the gap, as then made, was in compliance with the law; that it was either conclusive, or had the character of a judgment *in rem*, if any difference exists between the two things, so as to prevent any question being ever afterwards raised concerning it, as to the existence of the conditions required to constitute a free gap. This question, agitated for a long time, has up to the present resisted any final decision; though certainly it is the business of law to settle, once for all, even such claims or complaints, as, nevertheless, it is the instinct of truth or justice constantly to reproduce. Counsel for the defendants did not take upon them directly and in explicit terms to allege that the act of the Fishery Commissioners was an absolute legal bar, but rather that it was an obstacle of irresistible force and weight against any proceeding for penalties; and it occurred to me in the argument that the expression attributed to one of them, that if not an estoppel, it was almost an estoppel, very clearly represented the exact impression the state of things would make, on a mind not capable of appreciating the distinction between finality and reason. But though that was a circumstance to give rise to some hesitation, occasions are not uncommon in which the Court is called upon to take a more confident view than counsel present. Undoubtedly we are confronted in the case by what is a very serious argument, when we are called upon to say that what was fixed by public authority so long ago, can now be held to be illegal, and to be the subject of penalties at the discretion of magistrates, with motives of aggression to which the constitution of the tribunal may oppose but feeble resistance. Such a consideration ever yields to the danger of abrogating respect for established right, if that respect still survives frequent experiment. On the other hand, we have to regard the sense of wrong and injustice, of violation of natural right, involved in the continuance of what is indisputably contrary to law, such as the width of the free gap in this instance. For, whatever may be said on the point of the natural bed of the stream, whatever difficulties may attend the

attempt to distinguish the casual accretions from the original stratum, or to measure them off in time, or degree, or distance, the objection to the width stands absolutely clear of all uncertainty of opinion and evidence, and without the possibility of any real answer in point of law. It is most certain, to my mind, that the Commissioners were wholly mistaken in the principle on which the free gap was measured, and that the free gap must have the proportion assigned, not to the portion of the stream enclosed within the weir, but to the whole space of water in which fish can be taken; otherwise the weir could be contracted into the narrowest compass, and the gap diminished in proportion, and yet be embraced all round with arms covering a large part of the river, which is the precise form of the Lismore weir; and thus the weir owners could laugh at the law. It is impossible not to say that the insufficiency of the gap in width alone,—the difference, at the least, between 31 feet and 48,—must have a material share in the causes that have led to the evils complained of in this instance, that have emptied the river for sixty miles of the wealth that nature poured into it, and the consequences of which, in the retribution of nature for the violation of her laws, are indicated in the substitution of artificial modes for the propagation of salmon, for those which natural instinct itself provides, in the free ascent of the fish to the places of spawning.

The question is whether, upon the first branch of the complaint, the defects in the construction of the gap are to be perpetual, which depends upon the point whether the act of the Commissioners fulfils the conditions, and is attended with the consequences of a judgment *in rem*, so as to be a bar to all inquiry, an effect which it can only have by being a necessary execution of the authority possessed by the Commissioners, having regard to the express terms of the statute, laying down the conditions of the free gap. It cannot be said that, in the state of authority, the question is determined; for the judgments in *Devonshire* v. *Foot* (1) balance each other; and the *Lax Weir Case* (2), which we might have been surprised into considering an authority, on examination, is found at once not to solve the difficulty, for that was a decision

(1) Ir. R. 2 C. L. 514. (2) Ir. R. 2 C. L. 519, note.

Q. B. Div. 1899.

DEVONSHIRE, *Appellant*; DROHAN, *Respondent.*

O'Brien, J.

on the 5 & 6 Vict., and the very terms of the statute present the distinction which prevents it from being an authority in the present case; for the Act provides that in cases of dispute relative to the condition of the gap, the same shall be determined by the Commissioners, assigning to them an express judicial function, on the exercise of which the question arose, and which was to be followed by compensation, which brought it to the case of an ordinary judgment, to which there are no corresponding terms or reasons in the Act we have to deal with. On that point, I would call attention to the erroneous recital of that statute in the judgment of Chief Justice Lefroy, and to the construction put upon it by Baron Fitz Gerald, which is entirely disaffirmed by a perusal of the statute itself; because the clauses that precede the declaration that "in cases of dispute, relative to any of the matters aforesaid, the same shall be determined by the said Commissioners," all relate to the measurement and width of the gap; and not only that, but all the clauses that follow are confined to preserving the gap from any diminution of its width. And though it was brought before us with a certain show of emphasis, and though it was mentioned by counsel in *Devonshire* v. *Foot* (1), it was not noticed by any of the Judges, except by Whiteside, C.J., and Baron Fitz Gerald, for the purposes of distinguishing it on the grounds stated, and showing it could not be applied to the existing law. Therefore, we may lay the *Lax Weir Case* (2) entirely aside.

In approaching a question which has given rise to such a conflict of opinion, it has occurred to me to see what light could be got from the provisions made by legislation for the same object in other parts of the kingdom; and I consider that the English Act of 24 & 25 Vict. has a very material bearing on the question. That preceded the Irish statute by one year, and was the occasion of the very different legislation for this country—different in provisions and objects—which became, under the modifications resulting from private interest, a form of spoliation, without precedent in the violence of its injustice, except as the result of conquest. There are provisions in the English Act for fish-passes being made

(1) Ir. R. 2 C. L. 514. (2) *Ibid.*, p. 519, note.

by the owners of fisheries in weirs belonging to other persons which are not intended for fishing, and for passes being made in fishing weirs. In the former case, which involves a direct interference with the property of others, the free gap can only be made with the written consent of the Home Secretary, and of such form and direction as he may approve of. Now, let us see what is the provision for the other case—that of fishing weirs. Section 27 enacts that every fishing weir which extends more than half the way across the stream "shall have a free gap in accordance with the regulations following"—the same words as the 26 & 27 Vict.; with this important addition: "unless otherwise authorised by the Home Secretary under the powers of this Act." Then follow the regulations, from which those in section 9 of the Irish Act are directly copied. So that there is an absolute obligation, under the statute itself; and independent of any act or discretion of executive authority, that the free gap shall comply with the conditions stated, with penalties such as we have for the breach of them, while it requires a positive act of the State to allow any deviation from them. There are Inspectors provided for in the English Act, but of course they have not a power or duty assigned to them which is not reserved to the Home Office, to determine on the performance of the conditions. That is left entirely to the law. Section 28 enacts, in the same terms as section 12 of the Irish Act, that a free gap shall be made, and shall be maintained, prefacing the direction with the same words: "the following rules shall be observed for the purpose of enforcing efficient gaps in fishing weirs." Thus, in England, the agency by which free gaps are made and maintained is the command and sanction of the law itself. In order, therefore, to adopt the argument for the defendants, that there is a definite and final judgment which excludes all question whether the conditions of a free gap were satisfied, we must put a contrary construction upon an Act passed in the following year on the same subject, and with the same provisions and penalties, and import into it a power, in a temporary body of Commissioners, to supersede the statute, and create themselves into Judges of what shall exist for all time, without any indication or warrant for such authority in the language of the Act.

Q. B. Div. 1899.

DEVONSHIRE, *Appellant*; DROHAN, *Respondent*.

O'Brien, J.

Now let us look at the scope and structure of the 26 & 27 Vict., to see if it contains any indication of a policy, as distinguished from express terms, consistent with such a distinction of intention. That Act was passed, not to preserve, but to destroy weirs—to condemn, not to legalize them. Except the certificate in the 6th section, without which, by the 32 Vict. it was made illegal to fish, there is not a single qualifying or affirmative enactment in the whole Act, of a judgment of legality, required, or indicated to be pronounced. The Commissioners were empowered to inquire into the legality of all weirs throughout Ireland, and to remove such as were in contravention of any Act of Parliament or the law, with the qualification that, where the weir was illegal merely by reason of not having a free gap, they were not to have the power to remove the weir, if an undertaking were entered into, to the satisfaction of the Commissioners, "to make a legal free gap therein within a time to be prescribed by the Commissioners, and a free gap was made accordingly." What was the duty or function of the Commissioners that resulted from this enactment? If a legal free gap were made, they were not to remove the weir. Their power was not to pronounce a judgment of condemnation, but, by direct physical interference, to abate the weir. The converse of that power was inaction; they were simply to hold their hands. The 13th section required them to summon the parties interested in the weir, and to hear evidence; but with what object? The statute states the object: "before removing any illegal fishing weir." It says nothing of their pronouncing any judgment of legality. What was the order which such a jurisdiction authorized them to make? The summons of the Commissioners was to be deemed a complaint; and for the purpose of an appeal, if it could be applied to an event in which the Commissioners would be the appellants against themselves, "the dismissal of a complaint" was to be deemed a decision. If this proceeding were followed, the only legal order that could be made would be "that the complaint be dismissed"; out of which no one could make a judgment *in rem* of the efficiency of the free gap. Indeed, if there had not been a legal element in the Commission, desirous to exhibit a professional result, it is difficult to conceive what course of reasoning could have conducted them to such a solution of their proceedings

as an order declaring the weir to be legal, by way of determining that the requirements of a free gap were satisfied. In fact, the argument as to a judgment *in rem* must lead to the conclusion that the 9th section is blotted out of the Act; that a reason in the mind of the Commissioners is put in the place of the law; that a rule of obedience made for all time must cease to have any operation after two years, for then the Commissioners would have completed their labours, and declared all the weirs in Ireland legal, or removed them. Some criticism was passed upon the words of the 7th section, that an undertaking shall be "entered into the satisfaction of the Commissioners," and the gap made accordingly—as if this implied a specification of the work, and a judgment concerning it. These words mean no more than that an undertaking should be entered into which was considered sufficient, and a gap made in accordance with, or in pursuance of, the undertaking; and certainly his memory failed him when Monahan, C.J., in the judgment he gave, referred to the 7th section in the terms I have just heard from my colleague for the first time as containing any statement that the Commissioners were to determine on the execution of that undertaking. There is no such function mentioned in the 7th section, nor the least indication of it; and no reference to a hearing at which evidence as to the execution of the undertaking was to be received or adjudged on. But the words themselves furnish, to my mind, a most damaging argument against the defendants' view; for the undertaking was to make a *legal* free gap, and what was legal was a thing to be judged by the statute, not by the opinion of the Commissioners. If the latter were intended, the whole structure of the enactment would be different. Instead of positively laying down the rules for a free gap, the Act would have declared that the Commissioners were to order a gap to be made in conformity with those rules. That, however, was impossible; for there were free gaps already in existence, made pursuant to the 5 & 6 Vict., to which the 7th section could not in any manner be applied; and therefore a common standard was laid down—the standard for all alike. The rules apply in like manner to the free gaps which the owner makes after the Act, at his own instance, within twelve months, which is not "the time prescribed" for doing it under an undertaking,

Q. B. Div. 1899.

DEVONSHIRE, *Appellant*; DROHAN, *Respondent*.

O'Brien, J.

and for which case, therefore, there would be no provision whatever but the rules themselves of the statute, so that, if the Duke of Devonshire had made the gap of his own motion within the twelve months, the sufficiency of it must be determined by the Act, and no further proceeding would take place, and no occasion would exist or arise for any adjudication whatever. The terms in which the command of the law is expressed are most direct and explicit. "In every fishing weir there shall be a free gap or opening in accordance with the regulations following under the powers of this Act." Moreover, the Act is expressly made to govern the *maintenance* as well as the *making* of the gap; because section 12 says, "Where a free gap has been made in a weir, but the same is not *maintained in accordance with this Act*, the owner shall be subject to a penalty." There is no other respect indicated in which it can be "maintained in accordance with the Act," except by conforming to the provisions of the 9th section. What was erected was the thing that was to be maintained. But what was erected was to be a legal free gap. If the specific structure were what was to be maintained, without regard to its legal quality, that would be contrary to the words, that it was to be "maintained in accordance with the Act," as well as against common sense. If the defendants' argument be admitted, therefore, the weir could at once be legal in the erection, and illegal in the maintenance. But the logical consequence could even be pushed to the length of holding that if the defendant altered the weir in any way, even to make it legal—if he increased the width of the gap, instead of lessening it—he would be acting illegally,—a proposition which brings into strong light the objection against the law having committed to the Commissioners a power to declare the weir to be legal, in the face of, and in opposition to, the actual prescriptions of the statute.

In reality, the consequences that follow from the endeavour to reconcile the qualities and incidents of a judgment *in rem* with the statute, arise from the impossibility of trying to attach a character of perpetuity to mutable things. The subject was a variable one, and incompatible with an invariable judgment. A free gap in a weir fails in analogy to a physical object, which is the subject of trespass or ejectment, or to a determination of social or personal

status, which must always adhere to the individual. It is an exception to the use of a right, which becomes effective or ineffective under varying conditions, and resists in its nature an unchangeable quality, requiring to be attended by a power or tribunal capable of judging and preserving it from time to time in those shifting conditions. It must be conceded that, if natural causes came into operation, if the course of the stream shifted, and the gap became high and dry—which is very much the measure of its actual efficacy, according to the evidence—it could not be held to be "maintained in accordance with the Act." Indeed, Mr. Sullivan quite logically avowed that he did not care whether a salmon passed through the gap or not; and the argument would be no less consistent if the gap were turned into the towing-path of a canal. However, extreme conclusions of technical law that shock common sense are usually found to have a leak somewhere. If a change, from natural causes, would prevent the quality of a judgment *in rem* from applying, it cannot possess that character at all; and there is no distinction in the cause that makes the gap "not in accordance with the Act," unless we go farther into the wood, and invent a new kind of refinement—a qualified *judgment in rem*, a thing that sticks on or falls off—a quality which is quite fatal to the proposition, for it is the nature of such a judgment that the *status* is determined at once and absolutely, and adheres for ever to the subject. Let me call attention to the way that Mr. Justice FitzGerald, in *Devonshire* v. *Foot* (1), considered that he found a way out of the difficulties in which the case was involved by giving any effect to the decision of the Commissioners—a way, however, that leads directly to the destruction of the defendants' case. He ended in the opinion that Baron FitzGerald expressed upon the appeal—that it was final and conclusive, but only for the instant that it was made. "In my opinion," he says, "they had full authority to do so" [to declare that the weir was legal, and conformed to the statute], "and, having arrived at that conclusion, it seems to me to follow that where the legislature has created a special tribunal of this kind, and conferred on it the determination of certain questions, the judgment of that

(1) Ir. R. 2 C. L. 514.

Q. B. Div. 1899.

DEVONSHIRE, *Appellant*: DEOHAN, *Respondent*.

O'Brien, J.

tribunal, unappealed from, on questions coming within its jurisdiction, is final and conclusive *in the mode I shall point out*."

But what is "the mode he points out?" He says:—"I do not say it is final in this way, that the magistrates might not, at a future time, and under a change of circumstances, have jurisdiction to determine whether the free gap was or was not in accordance with the requirements of the statute. All I mean to say is that the order of the Commissioners was final and conclusive *at the time it was made*." And, at the end of the other judgments, he makes this remarkable observation:—"I have been misinterpreted in being considered to have said that the order of the Commissioners had the effect of a judgment *in rem*. I only meant to say that their decision on a matter of fact, viz. whether on the 15th day of February, 1866, the provisions of the Act of Parliament had been complied with, in the construction of this weir, was conclusive *on the day on which it was pronounced*."

That seems to me to give up the whole case for the defendants, on the first branch of the complaint. To say that the order was final and conclusive on the day it was made is to say no more than that it was right on the day it was made; and to preserve the right of the magistrates at a future time, and under a change of circumstances, to decide whether the free gap was or was not in accordance with the requirements of the statute, is to affirm what the magistrates have done in the present instance. "Under a change of circumstances" is introduced into the proposition as stated by Mr. Justice FitzGerald. But identity of circumstances cannot in any case take the matter out of the jurisdiction of the magistrates, and is not any exception or exemption from the necessity they were under of deciding whether there was a legal free gap at the time stated in the complaint, whether that was the result of original error or not. It will be observed that, in the order, and in the judgment of Mr. Justice FitzGerald, it is the *weir* which is declared to be legal, not the *gap*; and the gap is only brought within the effect of the order by inference that the order could not be legally made unless the gap were legal. I consider it open to much discussion whether this could at all be a judgment of *status* concerning the gap. However, I entertain no doubt whatever

that the Commissioners had no authority to make any such order, and that the root and foundation of the error lay distinctly in the confusion as to their functions. They were to inquire, and remove, if a gap were not legally made; and they could form an opinion for the purpose of their own action; but they could not go beyond what reached to the necessity of the function which they were to perform under the statute. If they chose to make a record of their conclusion, the only legal and proper record was, that they had inquired into the matter, and decided to not remove the weir. That would leave their opinion but an opinion, to carry whatever respect future time might attach to the error, caprice, or despotism of a revolutionary tribunal.

The judgment of Baron Fitz Gerald in the Exchequer Chamber appears to me to touch the case more nearly to the quick than any other. Having referred to the 7th section, he says:—"It would appear that it was upon an inquiry under this section . . . that the Commissioners took upon themselves to make the declaration of the legality of the weir and free gap relied on in the plaintiff's pleading. The jurisdiction of inquiring into the legality of the weirs is given as incidental to the proceedings for removal; for if the weir is found to be illegal, it is made the duty of the Commissioners to remove it. The cases contemplated in this section, and plainly those described in section 35 (5 & 6 Vict. c. 106), are the cases relating to the removal of illegal weirs. The object of the proceeding is to punish the owner for non-compliance with the provision of the statute by depriving him of the weir. The jurisdiction given to magistrates, by the 12th and 45th sections, is to enforce compliance with the statute by the owner of the weir, in making and continuing a free gap, by repeated penalties. The Commissioners, in deciding not to remove the weir, must no doubt be considered to have *incidentally* decided that the weir was legal, as regards a free gap, on the day of their decision. But it seems to me clear that their determination of the legality, in whatever form they were pleased to put it"—namely, a declaration that the weir was legal; one of those "forms" which so frequently came in question, and met with so much criticism and condemnation,—"can amount to no more than an adjudication in a matter incidental, and in no way bound the Justices in their inquiry as to the

Q. B. Div. 1899.

DEVONSHIRE, *Appellant*; DROHAN, *Respondent*.

O'Brien, J.

legality of the weir in respect of a free gap on the day alleged in the complaint. It might, it seems to me"—and let us see whether, by any ingenuity, an answer can be given to this argument—"be just as reasonably concluded that, if a charge under the 12th section had been made before Justices, instead of before the Commissioners, on the day on which the Commissioners made their order, and the Justices had acquitted, the jurisdiction of the Justices on the day mentioned in the complaint would have been ousted, on proof that things were in the same condition. The Commissioners have larger powers than the Justices have under the 12th section. Their authority extends to every illegality of weirs; but I can see nothing to give their sentence of acquittal any more extensive effect than a sentence of acquittal by the Justices."

This appears to me to be the true view of the case. The facts alleged to be proved before the Justices were wholly irrelevant to the question before them. Their only effect, if true, would have been to show that the Commissioners had come to a mistaken decision, supposing that the Justices rightly decided, as they did in fact decide, that the free gap was insufficient on the day of the complaint. I can perceive no resemblance between the decision of the Commissioners under the 7th section and a judgment *in rem*. It was a judgment, in my opinion, on a matter purely incidental. It was, in the argument of the case, attempted to import into the 7th section of 26 & 27 Vict. a provision contained in the 41st section of 5 & 6 Vict. c. 106—a section corresponding with the 9th section of the later Act laying down the several essentials of a free gap. This provision is that "in cases of dispute relative to any of the matters aforesaid the same shall be determined by the said Commissioners." Upon that provision the judgment of Lefroy, C.J., to a great extent was based; but, in my opinion, with great respect, it was plainly and distinctly an erroneous ground in the construction put upon it. "I acknowledge," says Baron Fitz Gerald, "I should have thought that this provision related wholly to that sentence of the section with which it is immediately connected, viz. that providing for the width of the gap, which in that section is made to depend upon a variety of matters and measurements; and for that reason it was omitted from the corresponding section of the later Act, in which much simpler provisions as to the width

of the gap are substituted. Perhaps the decision in the *Lax Weir Case* (1) is inconsistent with this construction. If it is so, and if this provision remains unrepealed, for the present purpose it is sufficient to say, that to hold that it gives exclusive jurisdiction to the Commissioners to determine on the legality of weirs in respect of a free gap would be wholly unwarranted by its language and inconsistent with the jurisdiction given to Justices."

It is not, perhaps, entirely correct to say, in measuring the different conflicting judgments on this question of the jurisdiction of the Commissioners, that the judgment of the Exchequer Chamber stands entirely on the decision of Mr. Baron Fitz Gerald; for Baron Deasy, although not making that the ground of his decision, says: "I think that to hold that they had the exclusive jurisdiction contended for by the counsel for the plaintiff here would be, in fact, to defeat the whole policy of the legislation, which was to compel the maintenance of these free gaps in weirs, by the imposition of penalties recoverable before Justices."

From that judgment the then Lord Chief Baron did not dissent. He concurred, he stated, without specifying in what respect, with many of the observations of Baron Fitz Gerald. I was a little surprised to hear that the judgment of Mr. Justice George in the Queen's Bench could be at all referred to in support of the defendants' view; for it appears to me to be entirely and distinctly against it. The passage that was referred to I shall quote. It was said that he treated the case as a dispute merely between the Duke of Devonshire and the Commissioners of Public Works; but let us see if he confined himself to that statement. "I take the effect," he says, "of the order of the 15th February, 1866, to be that, as between the Commissioners and the Duke of Devonshire, they have signed a document or certificate that he has made a free gap in exact accordance with their directions, and that it was then a legal weir; and that if the doctrine of estoppel is to be applied to this case at all, it can only be as between the Commissioners and the Duke of Devonshire, and in this way: that, having signed the document on the 15th

(1) Ir. R. 2 C. L. p. 579, note.

Q. B. Div. 1899.

DEVONSHIRE, *Appellant*; DROHAN, *Respondent*.

O'Brien, J.

February, 1866, which states that the weir was then a legal weir, because a free gap had been made in it pursuant to their directions, the only objection to the weir being that it had not such a free gap, they are estopped from saying that the weir was then illegal, and from proceeding to remove it on that ground, under the 7th section. My brother Fitz Gerald has stated, with such force and ability, the view he takes of this order of February, 1866, that I feel great hesitation in expressing a different opinion. He attributes to this order the effect of an adjudication or judgment *in rem*; and so much efficacy does he assign to it, that in his opinion it has the effect of abrogating or annulling certain positive enactments of the recent statute. The 25 & 26 Vict. c. 114 is a much more stringent Act than the previous statutes, for by the 5 & 6 Vict. c. 106, gaps were only required to be placed in fishing weirs which extended more than half way across a river, but by the recent Act it is provided that, no matter what the width of the river may be, in every fishing-weir there shall be a free gap, and that such free gap shall be in accordance with the regulations contained in the 9th section."

I entirely agree with the conclusions and reasonings of Baron Fitz Gerald, and the other Judges who have followed his view; and I hold, therefore, that the order made by the Justices on the first complaint in this summons, which complains of the owner not having made a free gap in the weir, was a legal order, and ought to be upheld. No doubt the lessees of the Duke of Devonshire, who represented his interests, may have considered themselves safe, at the time, from any future question, by submitting to make the free gap; but that in no way prevents our determining the question whether they are now subject to the ordinary law which applies to all subjects of the Queen.

I shall now make a few observations with reference to the second question to which the Chief Baron has referred; namely, the branch of the complaint which applies to not maintaining the gap. If we were to yield to the view that the order of 1866 applied to the weir at present, and there were no change of circumstances, it would not be easy to see how a proceeding for not maintaining a free gap, adjudged to have been legally constructed, could be sustained. However, the case is taken

entirely out of that difficulty by the evidence; for it appears that, since 1865, a change of a very important kind was made in the arrangement of the weir. Three hatches of the weir made at that time have been since closed; and it was competent to the magistrates to consider that this amounted to a change of circumstances which deprived the defendants of the right to rely on the order of the Commissioners; and it is not difficult, even for persons less acquainted with the subject, to discern the effect of such a change. It is not clear that such a change comes within the literal terms of paragraph 3 of section 12, which prohibits any alteration to be made in the bed of a river, so as to reduce the flow of water through a free gap. That, perhaps, applies more properly to the kind of interference with the bed, for which the remedy is indicated in the penalty, namely, by restoring the bed to its original state. But it seems, at the same time, to constitute the offence of not maintaining the free gap in accordance with the Act. The change in question might be capable of operating in various ways, so as to exercise a most important effect on the use or efficacy of the gap. It might divert the body of the stream from being drawn to that side, and a greater quantity might flow on to the gap than the hatches could receive or discharge. It might divert the volume of water away from the gap, towards the killing hatch at the other side, with the inevitable consequence, in one place or other, of accumulations from natural causes. Perhaps not the least important effect it would have would be to contract, or in the end dry up, the arm of the river that embraces the weir on that side; and thus lead the fish more away from the gap, and cause them to seek more easy access to the water in the arm on the other side. But one thing I consider certain,—it would, with the vigilant eye of self-interest always on that weir and river, with note taken of every fish, and observation of their tendencies and habits, with the aid of skill and experience,—make the arrangements of the Lismore Weir, already a tight place, as it would appear from the map, still more sweeping, more deadly, and destructive. As to this part of the case, the responsibility stands almost confessed, in the zeal with which the distinction of not maintaining, while it was safe, because there was no conviction on that ground, was pressed on the attention of the

Q. B. Div. 1899.

DEVONSHIRE, *Appellant*; DROHAN, *Respondent*.

O'Brien, J.

Court, in order to avert the more dangerous alternative of holding that the gap was not legally made.

I concur, therefore, in the conclusion, if the Court should not be able to see its way to a decision on the first count of the summons, that the case should be remitted to the Justices, with a declaration that there is evidence, on which they are entitled, and ought, to convict, on the count for not maintaining a legal free gap in accordance with the Act, and to impose the proper penalty for that offence.

ANDREWS, J.:—

The first complaint in the summons in this case was that the Lismore Fishing Weir, at the time of the commencement of the Act, 26 & 27 Vict. c. 114 (which I shall hereafter refer to as the Act of 1863), was without a legal free gap, and so continued up to six months immediately preceding the complaint; and that the defendants, having been for twelve months next preceding the complaint, and still being, the owners of the weir, did not during the said six months make a legal free gap in the weir, and left it without such gap. The Justices at Petty Sessions convicted the defendants on this complaint, and fined them £1000; and the first question to be determined is whether, on the facts, as proved before and found by the Justices, this conviction was right in point of law, or should be reversed.

The complaint in question is founded on the 1st sub-section of the 12th section of the Act of 1863, which provides for the making, as distinguished from the maintenance, of a legal free gap.

The 7th section of the Act of 1863 enacted that, subject to such appeal as thereinafter mentioned, the Special Commissioners appointed under that Act should inquire into the legality of all fishing weirs in Ireland, and remove such as were in contravention of any Act or law in force in Ireland; with this qualification, that where a fishing-weir was illegal only by reason of its not having a legal free gap, this section should not empower the Commissioners to remove it, if an undertaking was entered into, to their satisfaction, by the owner or other person interested in the weir, to make a legal free gap therein, within a time to be

prescribed by the Commissioners, and a free gap was made accordingly.

On the 9th of June, 1865, William, Duke of Devonshire, being the person then interested in the weir in question, was summoned by the Commissioners to appear before them on the 27th of that month, on an inquiry touching the legality of the weir, and having appeared, and any evidence he had to produce having been heard, the Commissioners decided that the weir was illegal only by reason of its not having a legal free gap, and the Duke having afterwards made and opened a free gap in the weir, the Commissioners then decided and declared the weir to be legal. These proceedings are recorded in a written adjudication, dated the 15th of February, 1866, under the hands and seal of the Commissioners, which was put in evidence for the defendants, and which I shall hereafter refer to as the Commissioners' decision of 1866. I regard it as having been not only proper, but requisite, that this decision should have been (as it was) authoritatively recorded in writing, if for no other reason than that it might have been made the subject of an appeal, under the 14th section of the Act of 1863.

If that decision (which remains unreversed) is conclusive as to the legality of the weir, at the time the decision was given, the conviction on the first complaint in the summons cannot, in my opinion, be sustained; and as I hold that that decision amounted to a judgment *in rem*, I think the conviction on the first complaint should be reversed. The startling results of holding that the Commissioners' decision was not conclusive are obvious, and I abstain from entering upon them. An adjudication pronounced upon the *status* of some particular subject-matter, by a tribunal having competent authority for that purpose, is a judgment *in rem*; and being a decision by such tribunal that the *status* of the thing adjudicated upon is as thereby declared, it is conclusive that the *status* of that thing was as so declared at the time of the adjudication. This I take to be a correct statement, as far as it goes, though it may not be an exhaustive statement, of what a judgment *in rem* is. As authority for it, I may refer to the notes to the *Duchess of Kingston's Case* (1), and the cases there referred to, which in my opinion fully sustain it.

(1) 2 Smith L. C. (ed. 7), pp. 785, 6.

Q. B. Div. 1899.

DEVONSHIRE, *Appellant*; DROHAN, *Respondent*.

Andrews, J.

Now, apply this to the Commissioners' decision of 1866. The then Commissioners were a tribunal specially appointed under, and empowered, and required by the Act of 1863, to inquire into the legality of, amongst others, the weir in question; and I confess that it appears to me to be manifest from the 7th section of that Act that it was not only within their power, but was part of their duty, to decide upon the legality of this weir, and, if they held it illegal only by reason of its not having a legal free gap, it was in my opinion competent to them to prescribe what should be done to make a legal free gap in it; and also both competent to them, and part of their duty, to determine afterwards whether what they had so prescribed had been carried out, and whether the weir had thus become legal. All this they did, as appears by their decision of 1866, and the documents connected with it; and—whether the opinion is right or not that it was competent to them to prescribe what should be done to make a legal free gap in the weir—it was at least competent to them, and part of their duty, to determine whether the gap, as constructed after their first inquiry, was a legal free gap. I do not think that the history of the prolonged litigation, in relation to the weir in question, discloses anything which precludes this Court from holding in the present case that the Commissioners' decision of 1866 was a judgment *in rem*. If it be urged that it was otherwise decided by the Court of Queen's Bench in 1868, on the case stated by the Justices with reference to the conviction of the Duke of Devonshire on the complaint of Mr. Foot in relation to this weir: *Devonshire* v. *Foot* (1),—my answer is that, in a criminal case like the present, in which there is no appeal from our judgment, we, a differently constituted Court, are not bound by that decision, from which there was no appeal, and from which Lord FitzGerald (then FitzGerald, J.) dissented. The judgments of Whiteside, C.J., and George, J., who were the other members of the Court, may not be thought altogether satisfactory. I say it with great deference, but they are not satisfactory to me. I think the previous judgment of Lefroy, C.J., in *The Queen* v. *Commissioners of Public Works* (2), which Whiteside, C.J., did not dissent from, is opposed to the conclusion which

(1) Ir. R. 2 C. L. 514. (2) Ir. R. 2 C. L. 519, note.

is arrived at. The judgment of Lefroy, C.J., was concurred in by the other members of the Court, viz. O'Brien, Hayes, and Fitz Gerald, JJ. It, no doubt, was a judgment on a different statute, with different words, and with reference to a different weir, viz. the Lax Weir at Limerick; but the 41st section of the 5 & 6 Vict. c. 106, which has been superseded by the Act of 1863, was analogous to, and *in pari materia* with, the provisions in the 7th and subsequent sections of the later Act; and it was held in the *Lax Weir Case* (1) that an adjudication of the then Commisssioners, under the provisions of the 5 & 6 Vict. c. 106 (the Commissioners of Public Works) upon the state of the Lax Weir, as regards conformity with the requirements of that Act, was a judgment *in rem*. The *Lax Weir Case* (1) came before the Court of Queen's Bench on a motion to make absolute a conditional order for a writ of prohibition under the particular circumstances of that case, and the conditional order was discharged; but I refer to the case for the clearly expressed judgment that the adjudication I have adverted to was a judgment *in rem*. Of the like opinion was Fitz Gerald, J., in *Devonshire* v. *Foot* (2) upon the Commissioners' decision of 1866, which we are now considering. I shall not occupy time by doing more than referring to his judgment, commencing at page 535 of the report, and to page 540, at which this summary of his judgment will be found.

Now, without going through all the other steps and phases of the litigation in *Devonshire* v. *Foot* (2), which ended in the informal conviction of the Duke being quashed, I shall content myself by referring to the decision of the Exchequer Chamber, the judgments in which are at present only to be found amongst a collection of Reports of Fishery Cases, but will, I hope, be published in a note to the report of the present case. All that, as I think, the Exchequer Chamber can be taken to have decided was that in that case prohibition did not lie. What they had to determine was not, as it appears to me, whether the Justices were right or wrong in point of law, but whether, under the circumstances, a writ of prohibition should go. This, at any rate, seems to have

(1) Ir. R. 2 C. L. 519, note; Reports of Fishery Cases, p. 1.

(2) Ir. R. 2 C. L. 514.

Q. B. Div. 1899.

DEVONSHIRE, *Appellant*; DROHAN, *Respondent*.

Andrews, J.

been the view on which the majority of the Court based their decision: and, notwithstanding the weight due to the opinion of so eminent a Judge as Mr. Baron Fitz Gerald, I am unable to come to the conclusion that what was actually decided by the Exchequer Chamber in any way *precludes* us from holding, in the present case, that the Commissioners' decision of 1866 was conclusive as to the legality of the Lismore Weir at that time. I have felt justified in greatly curtailing my observations on this question, having regard to the exhaustive manner in which it has been dealt with in the judgment of the Lord Chief Baron.

I now come to the second complaint in the summons in this case, which is founded on the 2nd sub-section of the 12th section of the Act of 1863; and, stated shortly, it was for not maintaining the gap in the Lismore Weir so as to be in accordance with the requirements of the Act of 1863. The Justices have not adjudicated upon this complaint, conceiving that, as they had convicted on the first count, they could not, as they otherwise would have done, convict upon the second also. Whether they were right in this view need not be determined in the present case; and I think it unnecessary to determine this question, which, according to my opinion, does not arise.

Treating the weir, as I think it must be considered, as having been in 1866 a legal weir, in accordance with the requirements of the Act of 1863, still, all the obligations of the owner of it under the 12th section of that Act were not thereby fulfilled. Under the 2nd sub-section of the 12th section, the owner was bound to maintain it so as to keep it in accordance with the Act. One of the requirements of the Act is (section 9, sub-section 2) that the sides of the free gap shall be in a line with, and parallel to, the direction of the *stream* at the weir. The Justices have found as a fact that the sides of the gap have not been *maintained* in a line with, and parallel to, the direction of the stream at the weir; and evidence was given before them sufficient to sustain this finding. It appears from the evidence that, since the gap was constructed, three hatches which were in the south wall of the weir have been closed; and there was evidence that the effect of this was to throw the flow of the water

to the north side of the weir, causing certain shoals, and scouring away an island which had been in front of the tail hatch; and that the result had been to divert the flow of the stream in such a way that the sides of the gap were no longer parallel to the direction of the stream at the weir. It follows, from the finding of the Justices which I have referred to, that the free gap has not been maintained, and is not in accordance with the requirements of the Act, as specified in section 9, sub-section 2, and that the Justices, upon their finding, to which I limit my judgment, ought to convict upon the second complaint in the summons.

It is not for me to point out how the present state of things, in this respect, can be rectified, so as to make the free gap in accordance with the requirement in question. It may be that the opening of the closed hatches, and the removal of the shoals, will allow the flow of the stream to return to the direction which will make the sides of the gap, as we must, in my opinion, assume they were, in 1866, in a line with and parallel to the direction of the stream at the weir. As matters stand at present, however, I think the Justices ought to convict on the second complaint; and, as this second complaint remains undisposed of, we ought, in my opinion, to remit the matter to the Justices, reversing the conviction on the first complaint, with a statement of the opinion of the Court that, having regard to the finding of fact by the Justices that the sides of the gap have not been maintained in a line with and parallel to the direction of the stream at the weir, they ought to convict upon the second complaint.

I have intimated that I limit my judgment respecting the second complaint to the finding of fact by the Justices which I have specially referred to, and which relates to the requirement of sub-section 2 of section 9 of the Act of 1863, and to the second particular set-forth in the second complaint in the summons.

I think it right to add that, in my opinion, the evidence given before the Justices at the hearing of the summons would not, having regard to the Commissioners' decision of 1866, justify them in convicting, on the second complaint, on any of the grounds specified in the first, third, and fourth, of the particulars therein set-forth, the evidence in relation to each of which was examined

Q. B. Div. 1899.

DEVONSHIRE, *Appellant*; DROHAN, *Respondent*.

and fully discussed in the course of the arguments before us on both sides; and I do not think it necessary to go into the details of that evidence again.

MURPHY, J. :—

I express no opinion upon the question raised in this case as to the finality of the order of the 15th of February, 1866. I concur in the conclusion arrived at, that the magistrates should have convicted upon the second charge stated in the summons, under subsect. 2 of sect. 9. It is, in my opinion, to be regretted that the questions arising in the case have not been raised by an information in the Superior Courts; for, in my opinion, on the evidence, the questions arising in the case would be whether any single one of the provisions made in sect. 9, as to the construction of a legal free gap, now exist in this so-called free gap in the Lismore Weir. This never can be decided before magistrates, or by the Court here on appeal from magistrates.

Concurring in the conclusion of the Court with respect to the violation that is manifested by the evidence, as to No. 2 of the requirements of a free gap mentioned in sect. 9, I must say that it appears to me that the changes that were made in this weir were made deliberately, in order to render this so-called free gap perfectly worthless for the purpose that it was made and intended for—the protection of the public. With regard to the other provisions contained in the 9th section—whether it is in the deepest part of the stream; whether it is, or ever was, on a level with the natural bed of the stream; and whether it is one-tenth of the width of the stream—it would appear to me on the evidence before the magistrates that it did not comply with any one of those provisions; but, not taking any part in the judgment as to what was established by the order of the 15th February, 1866, I express no further opinion on this.

The following order was thereupon made:—

"THE COURT is of opinion that on the facts proved before and found by the Justices, including the adjudication of the Special Commissioners, dated the 15th day of February, 1866, the Justices were not entitled to convict the defendants for not making a legal free gap in

the weir in question; but that, inasmuch as the said Justices have found that the sides of the gap were not, when the complaint was heard, in a line with and parallel to the direction of the stream at the weir in the summons mentioned, they ought to have convicted the defendants for not maintaining a legal free gap in the said weir: And accordingly the Court doth order that the conviction on the first complaint in the summons be and the same is hereby reversed .... and that the case be and the same is hereby remitted to the Justices, with the opinion of the Court, that by reason of their finding in respect of the matter stated in the second particulars of the second complaint in the summons, viz.: 'that the sides of the gap were not on a line with and parallel to the direction of the stream at the weir,' they ought to convict the defendants upon the said second complaint, and should impose in respect thereof such penalties upon the defendants as to the Justices shall seem right according to law: And it is further ordered that the parties do respectively abide their own costs of the case stated and the arguments thereon in this Court."

Solicitor for appellants: *W. J. Verlin.*
Solicitor for respondent: *Anthony Carroll.*

A. E. R. J.

DUKE OF DEVONSHIRE *v.* EDWARD O'CALLAGHAN FOOT (1).

Exch. Cham. 1872.
Nov. 7, 8, 9, 11, 23.

Prohibition—Justices, jurisdiction—Case stated (20 & 21 *Vict. c.* 43), *finality of decision of Superior Court—Salmon Fisheries (Ireland) Acts—Legal free gap—Certificate of Special Commissioners declaring a weir to be legal, its effect.*

D. had been convicted before Justices, in 1867, for not maintaining a free gap in his weir at Lismore, and the Justices had, at his request, stated a Case for the Court of Queen's Bench upon the question (substantially), whether (having regard to the fact that a free gap had, in 1865, been made in said weir in accordance with the directions of the Fishery Commissioners who, thereupon,

(1) Before MONAHAN, C.J., PIGOT, C.B., O'BRIEN and KEOGH, JJ., FITZGERALD and DEASY, BB., MORRIS and LAWSON, JJ., and DOWSE, B.

Exch. Cham. 1872.

DEVONSHIRE v. FOOT.

in 1866, had certified the weir to be legal, the weir not having since been altered), they had jurisdiction to convict upon proof that the bottom of the gap was, as a fact, higher than the level of the natural bed of the stream. The Queen's Bench having affirmed the conviction, D. obtained liberty from the Court of Chancery (Lord O'Hagan, C.) to declare in prohibition against the Justices. To his declaration, Foot, the complainant at Petty Sessions, pleaded the decision of the Queen's Bench as conclusive. To this D. demurred, and, the Lord Chancellor having allowed the demurrer :—

Held, on writ of error to the Exchequer Chamber, that the case was not one for a prohibition, and that the order allowing the demurrer should be reversed.

ARGUMENT, on writ of error, from the decision, on the Petty Bag side of the Court of Chancery, of Lord O'Hagan, C., allowing a demurrer to the defendant's plea to the plaintiff's declaration in prohibition : see the Report Ir. R. 5 Eq. 314, where the pleadings are fully set out.

On the 16th April, 1869, the plaintiff had obtained leave from the Court of Chancery (see Report, Ir. R. 3 Eq. 412) to declare in prohibition against the Justices of Co. Waterford to restrain them from proceeding to enforce a conviction (affirmed on Case Stated by the Court of Queen's Bench) under the Fisheries Ireland Acts, for not maintaining a legal free gap in the plaintiff's weir at Lismore (see Report of Case Stated, Ir. R. 2 C. L. 514). To this declaration the defendant (the complainant before the Justices) had pleaded the Order of the Queen's Bench as final and conclusive on all parties, and that, therefore, the writ should not issue. The plaintiff had demurred, and the Lord Chancellor had allowed the demurrer.

Waters, Q.C., and *D. O'Riordan*, for the plaintiff in error (Foot).

Butt, Q.C., and *T. Ryland*, for the defendant in error.

Cur. adv. vult.

[The following report of the judgments of the Exchequer Chamber has been taken, by the kind permission of H. M. Inspectors of Fisheries, from the short-hand note published by them (1)].

(1) The minute-book of the Court does not mention that Lord Morris was present when judgment was delivered, but mentions that Judge O'Brien did

MONAHAN, C.J.:—

This case of the Duke of Devonshire against Edward O'Callaghan Foot came before the Court on a writ of error from the Petty Bag side of the Court of Chancery. The proceedings in the Court of Chancery consisted of a declaration in prohibition, a plea thereto, and this plea demurred to; and on the argument of that demurrer my Lord Chancellor gave judgment, holding that it was a fit case to issue a prohibition; and accordingly, he gave judgment in favour of the Duke of Devonshire, there being no further pleadings and no issue of fact taken. The case now comes before us merely to consider the propriety of that judgment of my Lord Chancellor. The facts stated in the declaration, and also the facts stated in the plea coming before the Court merely on demurrer, we must take as correct as to the matters stated; and, accordingly, from the statements contained in the summons and plaint, and in the pleading, the facts appear to be these. Prior to the month of February, 1866, the Duke of Devonshire was seized in fee-simple of a several fishery in the river Blackwater, and also of a fishing weir therein; and it would appear that some time (the date is not given) prior to the month of February, 1866, the then Fishery Commissioners found that this weir of his that was across the river was illegal; but the only ground of illegality that existed in the weir, as appeared from the certificate of the Commissioners, which is referred to, but not stated at any length in this declaration, was that it had not a free gap as required by the Acts then in force. The then Commissioners, it would appear, took from the Duke, as they were authorized to do under the Act, an undertaking to make a free gap in pursuance of the provisions of the Act of Parliament. It would appear that some time prior to the month of February, 1866, this free gap was made; and it was then examined and looked at by the Commissioners, who, on the 15th of February, 1866, made an order, or granted a

not sit. The minute states that, the case being "called on for judgment, Chief Justice Monahan delivered the unanimous judgment of the Court, reversing the judgment of the Lord High Chancellor (Lord O'Hagan) on the Petty Bag side of the Court of Chancery in this cause." The result of the decision is also briefly noted, Ir. R. 7 Eq. 365.

Exch. Cham. 1872.

DEVONSHIRE v. FOOT.

Monahan, C.J.

certificate, stating or deciding that the gap so made was properly made and that this weir was then a legal weir in pursuance of the provisions of the statute. As I said in relation to the other proceedings, we have not got the full documents before us; we merely take the statement of them as given in the pleadings. It is further stated in the pleadings, and not denied or traversed, that the weir and this gap, and also the state of the river in relation to the gap, continued the same from the time of that certificate so given, up to the month of October, 1867, and up to the month of December, 1867, and up to the time of the pleading.

It appears that, such being the state of facts, Mr. Foot, in the month of December, 1867, made a complaint before the magistrates assembled at Petty Sessions; and he complained that this weir was an illegal weir in consequence of the bottom of it not being on a level with the bed of the river, as it ought to have been, in pursuance of the provisions of the Act of Parliament. It appears from the statement of the record, that the magistrates thereupon commenced the hearing of this complaint, and it was proved before them; and, as I understand, no question raised; but it was truly proved, according to the fact, that the weir remained in the state it was in at the time of the order of these Commissioners. The order itself was proved; and it was also proved that, in point of fact, no alteration had taken place in the bed of the river since the adjudication of the Commissioners; and it is stated in the record that thereupon the Duke objected that the magistrates had no jurisdiction further to interfere in the case, it appearing that, in point of fact, such an order as I have stated, or certificate, had been granted by the Fishery Commissioners, and that everything had remained in *statu quo* since the granting or making of that order. It appears, however, that the magistrates did not yield to that objection, but continued the hearing of the case, deciding, as is stated in the summons and plaint, [the declaration,] that they had jurisdiction so to do, and also deciding that the complaint was well-founded, and adjudging that the Duke, who was the person complained of, was liable to the penalty imposed by the Act of Parliament. The plea further states that upon that adjudication or determination having been so made by the

magistrates, the Duke applied to them in pursuance of the provisions of the Act of Parliament, to state a case for the determination of the Court of Queen's Bench; and that accordingly such case was stated, and was forwarded to the Court of Queen's Bench, and that the Duke appeared at the hearing, and the case was argued before them; and that Court decided against the validity of the objection made by the Duke, and accordingly decided that the magistrates had jurisdiction to entertain the case; and further, that the determination they came to, namely, that the Act of Parliament had been violated, was correct, and that the fact of the Commissioners having granted a certificate, and things remaining as they were at the date of that certificate, did not afford any defence to the Duke as against the complaint so made by Mr. Foot. Then the writ of prohibition [declaration in prohibition]—and of course it is from that document that I have taken almost everything that I have stated as to the existing state of facts—was issued; and the plea put in, in that state of facts, by Mr. Foot, was the adjudication of the Court of Queen's Bench, which adjudication, he states, should be considered as final and conclusive, and that, therefore, the case was not one for the issuing of a prohibition.

The only question that we have to consider in the present case is, whether the case is a fit one for a prohibition to issue, or whether the Chancellor ought to have ruled the demurrer in favour of the Duke or of Mr. Foot? That must depend on the true construction of one statute, though we were referred to several statutes *ad nauseam* during the argument in relation to the subject. It appears to us that everything must depend on the true construction of the 2nd and 3rd sections of the 26 & 27 Vict. c. 114. By the 7th section of that Act it is enacted that

"Subject to such appeal as is hereinafter mentioned, the Commissioners shall inquire into the legality of all fishing weirs throughout Ireland, and shall remove such as are in contravention of any Act of Parliament or law in force in Ireland, with this qualification, that where a fishing weir is illegal only by reason of its not having a free gap as required by law, this section shall not empower the Commissioners to remove such fishing weir, if an undertaking be entered into to the satisfaction of the Commissioners by the owner or other person interested in such weir, to make a legal free gap therein within a time to be prescribed by the Commissioners, and a free gap is made accordingly."

Exch. Cham. 1872. DEVONSHIRE v. FOOT. Monahan, C.J.

It is perfectly plain, therefore, from this section of the Act, that the Commissioners had authority to stay their hand and not to prostrate this weir because it had no gap in it, and that they were justified in taking the undertaking of the owner of the fishery, the Duke of Devonshire, to erect a proper free gap within it. It also appears from the latter part of the same section that the Commissioners also had authority to examine the weir when it should be so completed, and ascertain whether it was a legal weir; because the Act provides that they might take the undertaking, and also that they were to determine whether the free gap was made accordingly. Accordingly, no doubt, they had jurisdiction, and they were right, to determine in fact that this gap had been made in pursuance of the undertaking of the Duke, and to determine that this was a proper weir at the date of their certificate. These are, I may say, admitted facts on the record; but also, unfortunately for the Duke, there is another admitted fact, and that is that, though everything was remaining as it had been when these Commissioners made that certificate in the month of February, still in the month of October, when the complaint was made, and in the month of December, when it was investigated before the magistrates, the weir was not, in point of fact, on a level with the bed of the river, and the bottom of the gap was not on a level with the bed of the river. It was not alleged that that complaint was not well-founded in fact; but it was alleged that, even if those facts did exist, because the Commissioners had given a certificate, and because things remained as they were, the party was not liable to this penalty.

I have already referred to the section of the Act, which, in our opinion, gave jurisdiction to the Commissioners to make the investigation, and also to determine at the time whether or not the weir was within the provisions of the Act.

But then come the other sections of the Act namely, the 9th section, by which it is directed that "in every fishing weir there shall be a free gap or opening, in accordance with the regulations following, under the powers of this Act (that is to say)," amongst other things, "that the bottom of the gap shall be level with the natural bed of the stream above and below the gap." By the earlier clauses it is enacted that this free gap shall be situate in

the deepest part of the stream; that the sides of the gap shall be in a line parallel with the direction of the stream at the weir, and that the bottom of the gap shall be level with the natural bed of the stream above and below the gap. As I understand, the complaint made before the magistrates, whether formally or technically in these words, is in effect a complaint against the Duke for having maintained in the weir which had been so erected a gap so made that at the time it was not on a level with the natural bed of the stream. Well, then, it is provided by the next section of the Act, namely, section 12, that where a free gap has been made in a weir, but the same is not maintained in accordance with this Act, the owner of such weir shall incur a penalty not exceeding £5 a day, for each day he is in default; that is, where the gap has been made in the weir, but the same is not maintained. Now I think the fair construction of that is, to hold that it may apply to either a legal or an illegal weir; that whether the weir is made legally or illegally, he is bound to maintain in it a free gap in accordance with this Act. Well, then, one of the late provisions of this Act, sect. 45, enacts that all penalties imposed by this Act, which of course include the penalty of £5 a day for not having a gap in this weir in a proper state, shall be recovered and applied in the manner in which penalties under the Salmon Fisheries Acts are recoverable and applicable. There is no doubt whatever that the penalties under the Salmon Fisheries Acts—it is unnecessary to refer to them in detail—were recoverable before the magistrates, I believe at Petty Sessions; at all events, were recoverable before the magistrates in the ordinary way, and that the Petty Sessions Act applied.

Well, now, that being the case, the question for our consideration is merely this—whether this prohibition should have been allowed, or whether the demurrer should have been ruled in favour of the Duke or of Mr. Foot? It is unnecessary to refer to the cases, several of which were cited during the argument for the purpose of showing that, in the case of prohibition, the question is not at all as to the propriety of the judgment come to by the inferior Court. The only question is, had the inferior Court jurisdiction to hear and determine the case? If they had jurisdiction to hear and determine the case—no matter how erroneous their

Exch. Cham. 1872.

DEVONSHIRE v. FOOT.

Monahan, C.J.

decision may be, though the party may or may not have his remedy, according to the circumstances of the case, and according to the provisions of the Act which gives the magistrates jurisdiction—it is not a case for a prohibition merely because they have come to an erroneous decision in a case in which they had jurisdiction. Therefore it occurs to us that in this case all we have to inquire into is whether the magistrates had jurisdiction to determine the complaint made before them, and whether, on the investigation of the complaint, as soon as it appeared that this gap was in the same position and this weir was in the same position as it had been at the time of the granting of the certificate, they should have stayed their hands, and not decided either one way or the other, but determined that they had no jurisdiction to go further. Because, if they had jurisdiction to go further, whether they went right or wrong on that further journey, it still may be a case for an appeal, when an appeal lies on a statement of the case or otherwise, but it is not a case for a prohibition. Well, then, it occurs to me, notwithstanding the great number of cases that we have heard, that the question as to whether or not they had jurisdiction must be determined on the true construction of this Act before me.

The words of the Act are express—the substance of them being that where a weir is maintained or kept without the bottom or lower part of the gap being on a level with the bottom of the stream, a penalty is to be imposed. It was not suggested in argument that the complaint originally was not within the jurisdiction of the magistrates, and therefore that the magistrates had not a right to entertain the complaint, it being expressly one of the matters in which express jurisdiction is given to them; and the penalty is imposed for the breach of the duty imposed on the owner of the weir. It was not, I mean, substantially questioned but that they had a right to determine whether it was true in point of fact that the Commissioners had made the award which it is stated in the pleadings that they made, and also whether the further allegation was true that things remained as they were since the making of that award. Therefore, *ex natura rei*, they must have had jurisdiction to make that portion of the inquiry. Well, then, if they had jurisdiction to make a portion of the inquiry as to the validity of these defences, the question is,

what is there in this Act of Parliament to stop them there? We are of opinion that there was nothing to stay their hands, but that it was their duty then, having ascertained what the facts were, to decide as best they could the matter of law that then arose before them.

The matter of law that was argued before them, was, that inasmuch as these Commissioners were a Court having jurisdiction to do a great many things, and having jurisdiction to determine that this was an illegal weir, no magistrates could call in question the propriety of such their determination. It has been said that there was conclusive evidence that everything was right. Well, I can only say that if it be conclusive evidence that this weir was right, and if this weir at the time of being right was not in accordance with the Act of Parliament, it was conclusive evidence of a false conclusion of fact; but that—in the view that I take, and the majority of the Court take—is quite immaterial. Therefore as far as I am concerned, I do not enter into that question at all, and I am to be distinctly understood as not entering into the consideration of the question whether the magistrates came to a right or a wrong decision on the merits of the case.

Whether the magistrates should or should not have held that this penalty had been incurred, if they believed, as they must or ought to have believed on the facts proved, that the weir was in the state now that it was when approved of by the Commissioners—it appears to me equally certain that they must also have taken for granted, upon the evidence which was not disputed, that at this present moment it is not literally as directed by the Act of Parliament. Therefore I—and I believe I may say all the Court—are of opinion that the magistrates had jurisdiction to inquire into the matter; and that, they having made their decision—even if it rested with them, even if it had not gone to the Court of Queen's Bench at all—it is not a case for any Court to interfere by prohibition. It was a case, no doubt, for the Court of Queen's Bench, on a case stated, to consider. The Court of Queen's Bench did consider it, and the Court of Queen's Bench came to a particular conclusion against the Duke. They made a decision; and I can only say that, as far as I am concerned,

Exch. Cham. 1872.

DEVONSHIRE v. FOOT.

Monahan, C.J.

and I believe the members of the Court generally also, it is a matter of perfect indifference in the determination of this case whether that decision is right or wrong. All that we decide, as a Court, is, that it is not a case for a prohibition, and that, therefore, the judgment of the Lord Chancellor must be reversed.

I may mention that my brother, Mr. Justice O'Brien, who was present at the argument, and was a necessary member of the Court—for we required *nine* Judges—has made a communication to me to the effect that he concurs in the judgment I have pronounced, and also substantially in the reasons which I have assigned for that judgment.

I believe I may say that we all agree in this result. It may be that some other members of the Court may have come to that conclusion by a different route, and they may, perhaps, state their own particular views and reasons; but I am right in stating that the entire Court agree that it was not a case for a prohibition, and that therefore, with great respect to the Lord Chancellor, the judgment which he pronounced must be reversed.

KEOGH, J.:—

I just wish to say a few words in this case. The circumstances of it are very peculiar, and I wish just to add a word to the very clear statement made by the Chief Justice. The case was investigated by the magistrates, and they held that they had jurisdiction, and pronounced a penalty against the Duke of £2 10*s*. Afterwards, a Case was stated, with the full assent of both parties, for the opinion of the Court of Queen's Bench; and the Queen's Bench emphatically decided that the magistrates were right, and that they had jurisdiction. After that decision had been made by the Queen's Bench, this writ of prohibition is sought for. Now, it certainly is satisfactory that this Court is unanimously of opinion—first, that the magistrates had jurisdiction, and secondly, that, whether they decided rightly or wrongly, their decision was not a proper subject for prohibition, and that the great authority of the Queen's Bench in this country is not to be lightly questioned—in fact, to be entirely treated as nought—by one Judge sitting at the other side of the Hall, and claiming to

set up this, which I will call a most questionable, if not altogether an obsolete, jurisdiction. I confess I think this portion of the question very important. I am not aware that a single case has been quoted in the whole of the argument in which a prohibition of this kind was granted after the whole question had been fully decided by the Court of Queen's Bench. I confess I think this question far transcends in importance the decision of any fishery case. I believe that the Fishery Commissioners were only appointed for two years. I believe that their powers have been long since spent; but the Lord Chancellor held that when they made a decision, that decision was to be sustained against the rights of the general public appealing to the recognised tribunals of this country. The Chancellor did not give us the voucher of his own high authority as dissenting from the judgment of the Court of Queen's Bench. The utmost extent to which he has gone, according to his judgment, as reported, was to express the inclination of his own mind to concur with the one dissenting member of the Queen's Bench as against the judgment of that Court, and to treat it in fact as nought. I take it that a precedent of this kind is of evil example, and I am happy that this tribunal is unanimous in deciding that this authority was improperly exercised; and I may say that, as this decision can be appealed from, I hope that this case will be carried further, in order that, in the House of Lords, the jurisdiction of prohibition, exercised by the Chancellor, may be established if it exists, but condemned for ever if it be, as I believe it is, utterly indefensible.

FITZ GERALD, B.:—

I am sorry that, in the view that I take of this case, I find it necessary to state at some length the grounds of my judgment. The declaration in this case prays a prohibition to the Justices of the Peace of the county of Waterford acting in the Petty Sessions of Lismore, against issuing any warrant, and against further proceedings upon a complaint of the defendant Foot, upon which the plaintiff was convicted by certain Justices acting in the said Petty Sessions. The complaint was that the plaintiff, being the owner of a fishing-weir on the river Blackwater, did, on the 7th October, 1867, maintain in the said weir a free gap, the bottom of

Exch. Cham. 1872.

DEVONSHIRE v. FOOT.

FitzGerald, B.

which was higher than the natural bed of the river above and below the gap. The declaration avers that upon the hearing of this complaint before the Justices, certain matters of fact, whereof the truth is averred, were proved by the plaintiff, who thereupon objected to the jurisdiction of the Justices to further inquire into the legality of the weir and free gap, but that the Justices did assume such jurisdiction, and gave judgment against the plaintiff. The complaint was founded on the 12th section of the 26 & 27 Vict. c. 114; and I am of opinion that the subject-matter of the complaint was *primâ facie* clearly within the jurisdiction of the Justices. The cause of action in the declaration is the proceeding of the Justices to exercise their summary statutable jurisdiction after proof before them of certain alleged facts which ousted it, such further proceeding having been objected to by the plaintiff on that ground at the time.

If that declaration had been demurred to, the substantial question on such demurrer would have been, Whether proof of the alleged facts did oust the jurisdiction of the Justices further to inquire into the matter of the complaint against the plaintiff? The defendant did not demur to that declaration; he pleaded that at the time of judgment being given by the Justices, the plaintiff did, pursuant to the statutable enactment in that behalf, apply to the Justices to state a case setting forth the facts and the grounds of their judgment; that such case was duly stated, and heard by the Court of Queen's Bench, which Court, having heard and determined the question of law arising thereon, gave judgment and thereby decided that the Justices had jurisdiction to determine on the legality of the weir and free gap, and affirmed their judgment. The plea then submits that the Court of Chancery ought not to take further cognizance of the plaintiff's action. To this plea the plaintiff demurred.

The conclusion of the plea resembles the conclusion of a plea to the jurisdiction. It was not, however, contended—nor could it be successfully contended—that that plea could be sustained as a plea to the jurisdiction of the Court of Chancery; as such it plainly could not. It was supported in argument as a plea in the nature of estoppel by judgment recovered—deciding the very point in question—namely, the jurisdiction of the Justices, and

affirming the conviction. It must be treated, therefore, as a plea in bar.

Exch. Cham. 1872.

DEVONSHIRE *v.* FOOT.

I shall not stop to consider any formal objections which were or might have been made to the plea, or even apparently more serious objections which have occurred to me as arising from the particular nature of the present case. Independently of all these I think the plea is bad in substance. For the purpose of determining the question of the validity of the plea, I must assume that the declaration shows a sufficient cause of action in prohibition if unanswered—that is to say, states facts which show a want or excess of jurisdiction in the Justices which would warrant the issuing of a writ of prohibition. Though it is true that the plea of estoppel has not, any more than a dilatory plea has, the conclusive effect of a plea in confession and avoidance in admitting the facts alleged and untraversed by them, for the purpose of determining the validity of this plea, I must further assume the existence of facts, as alleged in the declaration, sufficient to give a cause of action if unanswered: just as the facts stated in the indictment in the case of *R.* v. *Johnston* (1), were assumed in a demurrer to a plea to the jurisdiction, though, of course, the defendant was not concluded by them. In short, in order to try the validity of an answer, I must assume that there is something to be answered. The statutable enactment which gives the Queen's Bench jurisdiction to decide in a case stated by Justices of the Peace, is the 20 & 21 Vict. c. 43. That Court, in giving what is called in the plea its judgment, was not acting in the course of the common law, but under the authority given to it, or to any single Judge of it in Chamber, by the statute, and nothing can be intended to be within its jurisdiction except what the statute expressly makes so to be; and if it appears on the record before us that it had not jurisdiction, its order or judgment, as it is called, can be no answer to the declaration. That a plea of judgment recovered in a Court shown to have no jurisdiction cannot be sustained, is shown by the strong case of *Briscoe* v. *Stephens* (2), in which the party impeaching the judgment was he at whose suit it had been made. Assuming, then, that the declaration here does *prima facie*

FitzGerald, B.

(1) 6 East, 580. (2) 2 Bing. 213.

Exch. Cham. 1872. DEVONSHIRE v. FOOT. FitzGerald, B.

show a want of jurisdiction in the Justices to make the determination which they did make, I am of opinion that the Court of Queen's Bench was without jurisdiction under the statute, because the jurisdiction thereby given to that Court is only on a case stated by the Justices after hearing and determination upon a matter which they had power to determine in a summary way. It is true that the plea was a decision of the Superior Court under its statutable authority, that the Justices had jurisdiction, and that the 6th section of 20 & 21 Vict. c. 43, provides that its order on the case stated shall be final and conclusive. But the inquiry as to the jurisdiction of the Justices is preliminary and incidental to the consideration of every case stated under that statute, whether expressly reserving that question or not, because on the result of that inquiry depends the jurisdiction of the Superior Court under the statute. The statute, no doubt, therefore, assumes the competency of the Superior Court to decide on the jurisdiction of the Justices; but this is only a matter incidental—perhaps I should rather say collateral—to the question directly before it, that is to say, the correctness of the judgment of the Justices on matters within their jurisdiction. And no judgment, even of a competent Court, on a matter thus incidentally cognizable, is conclusive, as a bar or otherwise, in a Court where the same matter is directly in question.

The mere form of an express decision, if there was such in the present case, cannot turn that which is a preliminary and incidental subject of inquiry in every case stated, into a decision directly on the point of jurisdiction. It must have been determined as an incidental matter before the question in the case, as such, could have been considered at all. It is true that the order of the Superior Court is, by the statute, made final and conclusive in a case in which the Justices had jurisdiction; in other words, it is as final and conclusive as the judgment of the Justices would have been if unappealed from; and accordingly the 9th section of the Act provides that after the decision of the Superior Court on a case stated, the Justices who originally decided the case, or any other Justices exercising the same jurisdiction, shall have the same authority—"authority" is the word used—to enforce the conviction, or order affirmed, as the Justices who

originally decided the case would have had to enforce their determination if it had not been appealed from. It is the exercise of that very authority which the present action seeks to prohibit; and, as regards the question of jurisdiction, I must, I think, consider the case just as if the original determination of the Justices had not been appealed from. No doubt, the same 9th section of the statute provides that no action or proceeding whatever shall be had or commenced against the Justices for enforcing such conviction or order by reason of any defect in the same; but the present action is not a proceeding against them for enforcing the conviction, but to prevent them from doing so, on the ground that the conviction, if unappealed from, would have given them no such authority. I am not, I need hardly say, to be understood as laying down for a moment that the Court of Chancery could prohibit the Court of Queen's Bench in an assumed exercise of its statutable jurisdiction. That is a matter on which, having regard to the case of *Ex parte Cowan* (1), I desire to express no opinion till the necessity shall arise, which is a case not likely to happen. It does not arise in this case. The prohibition here sought is to the Justices against enforcing their own judgment.

For these reasons I am of opinion that the plea cannot be sustained; and I am unable to decide the case on the ground that the order, or judgment, as it is called, of the Queen's Bench, is a bar to the action.

But we are to give judgment on the whole record; and I have therefore to consider the sufficiency of the declaration, which sufficiency I have hitherto assumed. On the facts alleged in the declaration, it appears to me, as I have already stated, that *prima facie* the Justices had jurisdiction. The facts alleged to have been proved before them on behalf of the plaintiff were the order of the Special Commissioners declaring his weir to be legal after the making of the free gap according to their directions; and that the free gap was, from the time of the making of that order, and thenceforth, and up to and on the 1st of October, 1867, the day on which the complaint was brought, in all respects in the same state and condition that it was in when the order was made, and that

(1) 3 B. & Ald. 123.

Exch. Cham. 1872.

DEVONSHIRE v. FOOT.

FitzGerald, B.

the natural bed of the river, and all other circumstances, had remained unaltered and in the same condition, Upon proof of these facts, the plaintiff objected to the jurisdiction of the Justices further to inquire into and determine upon the legality of the weir and free gap. The Justices, however, did assume the jurisdiction, and convicted the plaintiff, thereby, of course, determining the illegality of the weir in respect of the free gap, on the 1st of October, 1867.

Assuming that the proof of the foregoing facts did oust the jurisdiction of the Justices, still it was argued that the declaration shows that the Justices, up to this stage, *prima facie* had jurisdiction in the case, and that no prohibition was sought for till after their final judgment, and that, under these circumstances the declaration shows only an erroneous decision.

Now, to say nothing of the impossibility, from the nature of the Court in which the proceedings were, of applying for a prohibition after the Justices wrongfully assumed jurisdiction (as I assume) and before their final judgment, I apprehend that it is now perfectly settled that final judgment of the inferior Court, after objection taken to its jurisdiction in a case in which it *prima facie* has jurisdiction, is no bar to prohibition. Several of the authorities on this head are collected in the opinion of the Judges delivered by the late Mr. Justice Willes in the House of Lords, in the case of *The Mayor of London* v. *Cox* (1). The first case cited by him was *Thompson* v. *Ingham* (2), in which a prohibition was sought against the Judge of a County Court. A party had, in that Court, sued and obtained judgment against the plaintiff in prohibition, on a plaint for use and occupation, in which the County Court had *prima facie* jurisdiction. The plaintiff in prohibition appeared in the County Court, and protested against the exercise of jurisdiction by the Judge, on the ground that the title to land came in question. The Judge, notwithstanding, proceeded to determine the case, and gave final judgment for damages against him. It was held that, notwithstanding his final judgment, in a case in which the County Court had *prima facie* jurisdiction, the plaintiff was entitled to the writ, assuming it to have been shown

(1) L. R. 2 H. L. 239. (2) 11 Q. B. 710.

that the title to the land was really in question. Another of the cases cited by him, *Marsden* v. *Wardle* (1), was a case on a motion and not on the record; and the observations of Mr. Justice Coleridge, in giving judgment, are not without application to the present case, even supposing we had anything to do with the order or motion under which the present action was commenced. After noticing the authorities cited in favour of the objection, that the application was too late after judgment of the inferior Court in a matter in which it, *prima facie*, had jurisdiction, he says:—

"But this principle has no application to the County Courts; the proceedings there do not show the matter in any formal way; the excess of jurisdiction may depend only on the defence set up orally by the defendant, and may only appear in the course of the trial, and judgment may follow almost as soon as the defence is understood. Under such circumstances there would be no opportunity of moving for a prohibition before judgment; and unless the motion was allowed after judgment, the excess of jurisdiction would be without redress."

It was suggested by Mr. Justice Willes that the question as to what time a prohibition ought to issue is always one of practice only, and is to be determined on the motion for its issue. I am unable, therefore, to decide that the declaration is insufficient because it shows that the Court below had *prima facie* jurisdiction, and had proceeded to final judgment before prohibition sought.

It is true that in the case of *Thompson* v. *Ingham* (2), the Court in giving judgment appears to rely in some respect on the fact that no writ of error or appeal lay from a County Court, which is not the case here. Cases can be conceived in which the Court below in one view would have had jurisdiction; as possibly in this case on proof of the facts alleged, they might have had jurisdiction to have acquitted the plaintiff, assuming his contention in law to be correct. And, therefore, there might be a remedy by appeal. But even in this view the objection is met by the case of *Gould* v. *Gapper* (3), reported on the motion for prohibition in 3rd East, and on the pleadings in 5th East. The part of Lord Ellenborough's elaborate judgment relating to this part of the case will be found in 5th East, from p. 363 to p. 370. In that

(1) 3 Ell. & Bl. 695. (2) 14 Q. B. 710.
(2) 3 East. 472; 5 East. 345.

Exch. Cham. 1872.

DEVONSHIRE v. FOOT.

FitzGerald, B.

case the Ecclesiastical Court assumed to give itself jurisdiction by the misconstruction of a statute; and that such was the case here is the contention of the plaintiff.

There is, doubtless, another matter in the present case. It is plain on the whole record, though it does not appear on the declaration, that there was in fact an appeal by the plaintiff himself. This may be taken notice of, though the order on appeal may be (as I think it was) ill pleaded as a bar. It must be assumed that the statute was in fact construed by a superior Court of Common Law on the appeal; and, though the order be not of itself a bar, it may be and was argued that the whole record shows that the plaintiff has taken his chance with two tribunals before applying for prohibition, and therefore comes too late. I can easily understand that upon the original application for a prohibition, this was a matter most deserving of serious consideration by the Court which made the order for liberty to declare; but upon this record I cannot persuade myself that the question for us is any other than whether the order on appeal is a proper bar by estoppel.

I find myself, then, unable to dispose of this case without determining what I have called the substantial question raised by the declaration—that is to say, whether proof of the facts therein alleged did oust the jurisdiction of the Justices? I am of opinion that it did not; and on that ground, and that only, I concur in the judgment of this Court, that the decision of the Court of Chancery ought to be reversed.

The offence with which the plaintiff was charged before the Justices was disobedience of one of the directions relating to free gaps contained in the 9th section of 26 & 27 Vict. c. 114. The offence is punishable under the 12th section. The 7th section of the 26 & 27 Vict. c. 114 makes it the duty of the Special Commissioners to inquire into the legality of all weirs, but makes it also their duty to remove them if found illegal. If, however, the illegality consisted only in the weir not having a free gap, they have not power to remove the weir, provided the undertaking mentioned in the section to make a legal free gap be given by the owner of the weir, and that undertaking be complied with within a specified time. On failure it would seem to me plain that it is their duty to remove.

It would appear that it was upon an inquiry under this section, and upon compliance with an undertaking given by the plaintiff according to its provision, that the Commissioners took upon themselves to make the declaration of legality of the weir and free gap relied on in the plaintiff's pleading. The jurisdiction of inquiring into the legality of weirs is given as incidental to the proceedings for removal; for if the weir is found to be illegal, it is made the duty of the Commissioners to remove it. The case contemplated by this section, and plainly those described in section 35, are the cases relating to the removal of illegal weirs. The object of the proceeding is to punish the owner for non-compliance with the provision of the statute by depriving him of his weir. The jurisdiction given to Justices of the Peace by the 12th and the 45th sections is to enforce compliance with the statute by the owner of the weir in making and continuing a free gap by repeated penalties. The Commissioners in deciding not to remove the plaintiff's weir, must, no doubt, be considered to have incidentally decided that the weir was legal as respected a free gap on the day of their decision. But it seems to me clear that their determination of its legality, in whatever form they pleased to put it, can amount to no more than an adjudication in a matter incidental, and in no way bound the Justices in their inquiry as to the legality of the weir in respect of a free gap on the day alleged in the complaint. It might, it seems to me, be just as reasonably concluded that, if a charge under the 12th section had been made before Justices instead of before the Commissioners, on the day on which the Commissioners made their order, and the Justices had acquitted, the jurisdiction of the Justices on the day mentioned in the complaint in question would have been ousted on proof that things were in the same condition.

FitzGerald, J.

The Commissioners have larger powers than the Justices have under the 12th section. Their authority extends to every illegality of weirs, and they can punish by removal; but I can see nothing to give their sentence of acquittal any more extensive effect than a sentence of acquittal by the Justices. This appears to me to be the true view of the case. The facts alleged to be proved before the Justices were wholly irrelevant to the question before them. Their only effect, if true, would have been to show that the

Exch. Cham. 1872. DEVONSHIRE v. FOOT. FitzGerald, B.

Commissioners had come to a mistaken decision, supposing that the Justices rightly decided, as they did in fact decide, that the free gap was insufficient on the day of the complaint. I can perceive no resemblance between the decision of the Commissioners under the 7th section and a judgment *in rem*. It was a judgment, in my opinion, in a matter purely incidental.

It was, in the argument of the case, attempted further to import into the 7th section of the 26th and 27th of the Queen, a provision contained in the 41st section of 5 & 6 Vict. c. 106, a section corresponding with the 9th section of the latter Act, in laying down the several essentials of a free gap. This provision is to the effect, that in cases of dispute relative to any of the matters aforesaid, the same shall be determined by the said Commissioners. I acknowledge that I should have thought that this provision related wholly to that sentence of the section with which it is immediately connected, viz., that providing for the width of the gap, which is in that section made to depend on a variety of matters and measurements, and that for that reason it was omitted from the corresponding section of the later Act, in which much simpler provisions as to the width of the gap are substituted. Perhaps the decision in the *Lax Weir Case* (1) is inconsistent with this construction. If it be so, and if this provision remains unrepealed, for the present purpose it is sufficient to say, that to hold that it gives exclusive jurisdiction to the Commissioners to determine on the legality of weirs in respect of a free gap, would be wholly unwarranted by its language, and absolutely inconsistent with the jurisdiction given to Justices of the Peace by the same and the later statute.

On these grounds I concur in the judgment of the Court.

DEASY, B.:—

I am of opinion that the magistrates had jurisdiction, and that this appears on the record here, and, this being so, that this was not a case in which a prohibition should have issued. The whole policy of the statute would be defeated by the construction contended for by the counsel for the plaintiff here. The great object of the policy manifested by the statute was to preserve a free gap

(1) Ir. R. 2 C. L. p. 519, note.

in all the weirs, extending across rivers, of the particular dimensions and construction stated; and the way of enforcing the maintenance of those weirs in that state was by imposing severe pecuniary penalties to be recovered in a summary way. If, before these penalties could be enforced, it were necessary to apply to the Commissioners, whose powers were to expire at the end of two years, and to bring them down to get an order from them as to the state of the weir, the whole object of the Legislature in that respect would be entirely defeated. Whole seasons might pass away before it could be possible to obtain a decision from the Commissioners. I think that to hold that they had the exclusive jurisdiction contended for by counsel for the plaintiff, would be in fact to defeat the whole policy of the Legislature, which was to compel the maintenance of these free gaps in weirs by the imposition of penalties recoverable before Justices. I am, therefore, of opinion that the Justices had full jurisdiction to entertain the complaint and adjudicate on it. Whether the circumstances of the weir were in exact conformity with the Commissioners' certificate, is a matter on which I am not prepared to give an opinion. I think the magistrates had jurisdiction. They had jurisdiction, therefore, to state a case; and the Queen's Bench had jurisdiction to interfere and entertain that case, and to decide upon it. Their adjudication, therefore, was final and conclusive; but I am no disposed to express any opinion as to what the conclusion would be if the Justices had not had jurisdiction. I am not disposed to differ from what has been stated by Baron Fitz Gerald on that subject. I do not think it necessary to express any opinion beyond stating that they had full jurisdiction to entertain and inquire into the complaint and to impose a penalty. Whether they exercised that jurisdiction soundly or not, is not for me to say.

PIGOT, C.B.:—

I should not have said anything but for one observation which has fallen from one for whom I entertain the greatest possible respect. I must express my very strong opinion that the jurisdiction to issue a prohibition under circumstances such as those now before the Court is not obsolete, but is in full force; and I confess I should be extremely sorry that that jurisdiction, as old as the

Exch. Cham. 1872. DEVONSHIRE v. FOOT. Pigot, C.B.

earliest periods of our law, should be ever withdrawn. I concur in the judgment of the Chief Justice, and for his reasons. A great deal of what Baron Fitz Gerald has stated I also concur in. I must say—and I think it right to advert to the circumstance—that, on the main point in the case, the very point upon which so much controversy has arisen, and upon which there seems to be a considerable difference of opinion—some difference between the views entertained here and some of those entertained in the Queen's Bench—the Chancellor expressly stated that he thought it a fit subject for consideration in the superior tribunal, and that this constituted one of the reasons why he did not wish to conclude the party by refusing the issue of the prohibition.

Solicitor for plaintiff in error: *J. B. Julian.*
Solicitor for the Duke of Devonshire: *B. Orpin.*

[A. E. R. J.]

Appeal. 1899. Oct. 27. Nov. 2. Dec. 9

IN RE HARRIET O'HARA, AN INFANT (1).

Infant—Custody—Mother, right of—Abandonment—Custody of Children Act, 1891 (54 *Vict. c.* 3).

The father of the infant, who was a farm-labourer, died in 1890, leaving a widow and three children, of whom H. was the youngest. The mother, being in poor circumstances, obtained employment as a domestic servant, and placed the children under the care of the Protestant Orphan Society. In October, 1897, the mother was in the service of M., a farmer possessed of a substantial farm in the county of Fermanagh, and on the 5th October, 1897, an agreement in writing was entered into, between the mother and M., that M. should adopt the child, and the mother agreed to give the child to M., and to have no claim on her. Shortly afterwards the mother was married again to a small farmer, near N., in the county of Fermanagh. There was no difference of religion between the parties. In the beginning of 1899, the mother demanded the child from M., who refused to give her back, unless he was paid for her support and maintenance.

On a motion for a writ of *habeas corpus*, Kenny J., sitting as Vacation Judge, saw and had a conversation with the child, and was satisfied that she

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON, and HOLMES, L.JJ.

regarded with the strongest aversion the idea of returning to her mother, and held that, having regard to the handing over of the child under the circumstances deposed to, the character of the mother's evidence, as given in her affidavits, and the circumstances and present position of the child, the latter ought not, from the point of view of its own welfare, to be taken from the custody of M. :—

Held by the Court of Appeal (reversing the decision of Kenny J.), that the mother had not deserted or abandoned the child within the meaning of s. 3 of the Custody of Children Act, 1891, and that she ought to be given into her mother's custody. "The Custody of Children Act, 1891," discussed.

MARY ELLIOTT, the mother of the minor, was married first to James O'Hara in September, 1877, and there were three children, a son and two daughters, of whom Harriet O'Hara was the youngest. She was born on the 1st July, 1888. James O'Hara died in January, 1890, and after his death the widow, being in poor circumstances, obtained employment as a domestic servant, and sent the children to the Fermanagh Protestant Orphan Society. She went to see the child once a year, when the Society held a meeting in Enniskillen. She was then in service about ten miles from Enniskillen; and walked the distance to see her child. About the end of 1896 Mrs. Elliott was in the employment of a farmer named Edward M'Mahon, who had a farm of over 40 acres near Brookborough, in the county of Fermanagh. M'Mahon was married, but had not any children. Mrs. Elliott had received a small legacy of about £30 in 1895, and in October, 1897, she asked M'Mahon to take the custody of Harriet, who was then about nine years old, which he consented to do, and an agreement was then drawn up by M'Mahon, which the mother and M'Mahon signed, to the following effect:—"Articles of agreement made and entered into this 5th day of October, 1897, between Edward M'Mahon, of Carrickapolin, in the county of Fermanagh, of the one part, and Mary O'Hara, widow, in said county, of the other part: whereby the said Edward M'Mahon agrees to adopt Harriet O'Hara, child of Mary O'Hara aforesaid, and the said Mary O'Hara agrees to give Harriet O'Hara to the said Edward M'Mahon, and have no claim on the said Harriet O'Hara, who was born and baptized in the parish of Galloon, county Fermanagh, and is nine years old on the 1st July, 1897."

The mother left M'Mahon's employment shortly after, and in

Appeal. 1899. *In re* O'Hara.

the month of February, 1898, she was married to one James Elliott, a farmer, who had a small farm of 4 acres, with a small house, close to Newtownbutler, in the county of Fermanagh.

In the month of May, 1899, Mrs. Elliott wrote a letter to her daughter Harriet, asking her to come and pay her a visit from Saturday to Monday. The request was complied with, and the child was sent down. Mrs. Elliott complained that on the occasion of this visit the child was in an unclean condition, and presented the appearance of being badly cared for. This was denied by M'Mahon. On the 20th May, 1899, Mrs. Elliott and her husband went to M'Mahon's house and demanded that the child should be given to her. This demand was refused by M'Mahon, and a discussion took place, which finished by Mrs. Elliott and her husband being thrust out of the house.

On the 11th June, 1899, Mr. Winslow, Mrs. Elliott's solicitor, wrote a letter to M'Mahon, again demanding the child for the mother, to which M'Mahon replied by letter, dated the 13th June, offering to give up the child provided he was paid for her support and maintenance during the time she was with him. Further correspondence passed, in the course of which M'Mahon stated that the sum he was prepared to take for the child's maintenance was £8 10*s*.

During the two years the girl lived with M'Mahon she had been sent regularly to the National School and the Sunday School, and certificates were produced from the school teacher and the medical officers of the district to certify that the child had always been well cared for and treated. M'Mahon also deposed that his wife and he were both much attached to the child, and that the child was fond of them. There was no difference of religion, as the parties were all members of the Church of Ireland. It was sworn by Mrs. Elliott, and not contradicted, that M'Mahon dispensed with the services of a servant woman within three months after Harriet O'Hara went to reside with them, and that she worked as their servant, not only in the house, but in the fields.

On the 5th July Mrs. Elliott obtained a conditional order for a writ of *habeas corpus* against M'Mahon in order to obtain the custody of the child.

On the 2nd August an application was made to Kenny, J.,

Appeal. 1899. *In re* O'HARA.

sitting as Vacation Judge, to make the order absolute, and M'Mahon opposed. Kenny, J., saw and had a conversation with the child, and was satisfied that the child regarded with the strongest aversion the idea of returning to her mother. His Lordship held that, having regard to the mother handing over the child under the circumstances deposed to, the character of her evidence as given in her affidavits, and the circumstances and the then position of the child, the latter ought not, from the point of view of its own welfare, to be taken from the custody of M'Mahon. From that decision Mrs. Elliott appealed.

On the 27th October the case was argued by counsel in the Court of Appeal, when the Court adjourned the case until the 2nd November, and intimated that the parties might, if they thought fit, attend and give evidence. On the 2nd November Mrs. Elliott and her husband attended, and also M'Mahon, and the child was in Court. Mrs. Elliott and her husband and M'Mahon were examined. At the end of the hearing the case was again adjourned, and the Court intimated that M'Mahon might, if he thought fit, lodge an undertaking for the purpose of stating what provision, if any, he intended to make for the child. On the 6th November, 1899, M'Mahon lodged an undertaking by which he agreed to maintain and educate the child in a proper manner until she attained twenty-one, or married with the approval of the Rector, and on her attaining twenty-one or marrying with such approval as aforesaid to pay her £20, and in the event of his death before either of those events to charge his property with £20 in her favour.

Bernard, for Mrs. Elliott.

Morgan Byrne, for M'Mahon.

Dec. 9.

LORD ASHBOURNE, C. :—

This is an appeal from an order of Kenny, J., sitting as Vacation Judge, made on a motion for a writ of *habeas corpus*, instituted by the mother of the infant, Harriet O'Hara. The application was made by the mother, and the circumstances must be very special which will prevent a mother from obtaining the custody and control of her child, of only eleven years of age. The facts

Appeal. 1899. *In re* O'HARA. Lord Ashbourne, C.

of the case are undisputed. The father and mother of the child were married in 1877, and the father died in 1890, leaving a son and two daughters. There is no question about religion, as the parties are all Protestants, and these three children were all brought up by the Protestant Orphan Society. The mother is a humble, but respectable, woman, and after the death of her husband she had to work as a domestic servant te earn her livelihood. Whenever she had opportunity she went to see her youngest child, Harriet, to ascertain that proper care was being taken of her, the son and the elder daughter being able to provide for themselves and to earn their own living. But the youngest child had still to be looked after.

It appears that Mr. M'Mahon, in whose employment the mother then was, intimated to her, apparently on her request, that he would be willing to adopt the child and look after her. Nothing was done at first with respect to this offer. M'Mahon was a respectable farmer with 45 acres of land; he is married to a respectable wife, and they had no children, their only child having died some years ago, a circumstance which gave more point to their wish to have a child in their establishment.

After a time M'Mahon—it has been stated at the suggestion of the mother—renewed the proposal to take the child, and this proposal has produced the agreement, signed by the mother, which was the subject of the controversy. On the question of the signing of this agreement the mother's evidence was not satisfactory. The conclusion, however, arrived at by all the members of the Court is that she did sign the agreement, which was to the effect that the child should be given over to M'Mahon, and should be brought up and educated by him. The child was left with M'Mahon, and in the month of May, 1898, the mother was married to her present husband, Elliott. He was examined before us, and seemed to be a decent, honest man of his class, of a blameless character. After the marriage the mother's position was changed. She had got a home for the first time for many years, and as time went on she saw that the home was there available for her child, and the husband was satisfied. The idea naturally came into her mind that she would like to have the child with her. Having heard something from her son, she went with her husband

to M'Mahon's and demanded the child. There was a scene on that occasion, when, I have no doubt, she was excessive or abusive in her language, owing to the excitement of the occasion; but M'Mahon refused to give up the child. For his conduct on that occasion M'Mahon was summoned before the Petty Sessions Court, and a small fine was imposed on him, showing that the magistrates thought that he used more violence than was necessary to get the Elliotts out of his house. But the mother did not allow matters to rest there. She felt that the child should naturally look to her as her mother for instruction and guidance, and for an example in honesty and morality. She had a home and the husband had a small farm of 4 acres, which he is willing to settle on the child. Mrs. Elliott had a little legacy of about £30 left to her, which, no doubt, she has taken care of, and has got the greater part of it yet, as she looked a thrifty person.

M'Mahon, on the other hand, is a very respectable man, and has given his evidence fairly. I believe that he and his wife attended to the child perfectly well, and that his wife is very strongly attached to the child. On this the correspondence was given in evidence, and I do not think that that is a fortunate correspondence on M'Mahon's side, because he never took any resolute stand, on the ground that the child, having been handed over to him, had become so attached to his wife and him as to look upon them as parents, and that its affections were so intertwined with their abode that it had become the child's home. Instead of that, all that he said was that if the child was to be taken back her board and maintenance were to be paid for, and the sum of £8 10*s.* was the amount mentioned. That certainly did not appeal to a high level. It was suggested that he may have urged this as an argument that the mother had better stand by the agreement, which had been signed, that she could not have the child for the asking, and that she would be wise to let matters stand as they were. Although the correspondence does not leave a favourable impression on my mind, still I believe that M'Mahon's conduct was *bona fide*.

It was pointed out by the Court on a former occasion that there was no security for carrying out the agreement, as the agreement conferred no legal *status* on the child. M'Mahon might change

Appeal. 1899. *In re* O'Hara. Lord Ashbourne, C.

his mind, or his wife might change her mind, with respect to the position of the child, or their affection for her. Accordingly the Court intimated that M'Mahon might, if he desired, but only if he desired, send in an undertaking as to what he intended to do, in order to allow the Court to appreciate his attitude. He has done so; but the undertaking is very prudent, cautious, and limited, to the effect that he would be willing to support the child until she was twenty-one, and to pay her £20 on her marriage to the satisfaction of the Protestant clergyman. That offer is open to criticism. The M'Mahons do not keep a servant, although they used to do so; and it is obvious that as the child grows up her services as a domestic servant will become more valuable. If the child was to be kept for a servant, merely for her board, without wages, that might be a very advantageous contract, in a pecuniary sense, for the M'Mahons. Moreover, it must be borne in mind that human life is uncertain. If M'Mahon died, or his wife died, what would be the future of the child?

We were referred in the course of the argument to the statute, 54 & 55 Vict. c. 3, the Custody of Children Act, 1891—a very useful Act for the purposes for which it was intended. It deals with the case of a child deserted or abandoned by its parents, or where the parent has so acted as to disentitle himself, or herself, to the custody of the child; and in those cases it provides that the parent would not get a writ of *habeas corpus* without satisfying the Court that he or she is a fit person to have the custody of the child. That is a wise and beneficent statute, but it is not this case at all. This is a case where a woman, who had no home, made the provision she thought best for her child at the time. In no sense did she abandon or desert her child. She did her best according to her means and opportunities. She is a sober, honest, hard-working woman, and now she has a home to which she can take the child. Even if the question was the balance of one home against another, that is a topic to which I would not attach much weight; possibly, if she were to be left with M'Mahon, her clothes and food might be a little better; but that is not the point. The point is that a mother, who has honestly striven to discharge her duty, is asking to have the custody of her child; and although she fenced in her evidence about the agreement, her position as the mother cannot

be disregarded, except for the strongest reasons. In another branch of my jurisdiction I am familiar with questions about the custody of minors. They arise frequently; and I would never, except for the strongest reasons, deprive the mother of the duty and the right to direct, control, and educate her child, under twelve years of age.

When the case was before him, Kenny, J., had an interview with the child. We did not adopt this course; but I saw the child in Court, and she appeared to be well cared for and well brought up. But I do not rest my judgment on the fact of the child being well cared for or not. I rest my judgment on the broad ground that the mother is entitled to the custody of the child; and there is nothing in her conduct, her character, or her present position to induce any Court to take away her child from her.

We shall discharge the order of Kenny, J., and allow the writ to issue; but we shall put a stay on it for ten days, to permit the parties or their solicitors to give effect to our decision without the issue of the writ. There will be no costs.

FITZGIBBON, L.J.:—

I offer the same excuse for adding anything which Kay, L.J., gave in *Gyngall's Case* (1)—namely, that "questions of law and equity of very great importance" are involved.

The following principles appear to be settled:—1, At Common Law, the parent has an absolute right to the custody of a child of tender years, unless he or she has forfeited it by certain sorts of misconduct; 2, Chancery, when a separate tribunal, possessed a jurisdiction different from that of the Queen's Bench, and essentially parental, in the exercise of which the main consideration was the welfare of the child, and the Court did what, on consideration of all the circumstances, it was judicially satisfied that a wise parent, acting for the true interests of the child, would or ought to do, even though the natural parent desired and had the Common Law right to do otherwise, and had not been guilty of misconduct; 3, The Judicature Act has made it the duty of every

(1) [1893] 2 Q. B. 232.

Appeal. 1899. *In re* O'Hara. Fitz Gibbon, L.J.

Division of the High Court to exercise the Chancery jurisdiction; 4, In exercising the jurisdiction to control or to ignore the parental right the Court must act cautiously, not as if it were a private person acting with regard to his own child, and acting in opposition to the parent only when judicially satisfied that the welfare of the child requires that the parental right should be suspended or superseded.

I merely summarise these principles from the judgments of Lord Esher and Kay, L.J., in *Gyngall's Case* (1), where the authorities for them may be found.

The same case guides us also on some minor points. It was argued that Kenny, J., ought not to have consulted or considered the wishes of Harriet O'Hara, because she was only eleven years of age, though he found her capable of expressing those wishes strongly and intelligently. I entirely dissent from this contention. From the time of King, C., in *Ex parte Hopkins* (2), the Court of Chancery has exercised its discretion in seeing young children, not for the purpose of obtaining their *consent*, but for the purpose, and *as one of the best modes*, of determining what is really for their welfare, though the Common Law Courts, as a general rule, would not inquire, as between parent and child, as to the child's consent, below the age of fourteen for a boy, or sixteen for a girl. Kay, L.J., distinctly approved of the practice, where the child is of *any reasonable age*, of seeing and speaking to it, of ascertaining its own views on the matter, and of treating them as a main matter for consideration, in the exercise of the parental jurisdiction. But on the other hand, the parent's *prima facie* right must also be considered, and the wishes of a child of tender years must not be permitted (to use the words of Lord Campbell) to subvert the whole law of the family, or to prevail against the desire and authority of the parent, unless the welfare of the child cannot otherwise be secured.

It appears to me that misconduct, *or* unmindfulness of parental duty, *or* inability to provide for the welfare of the child, must be shown before the natural right can be displaced. Where a parent is of blameless life, and is able and willing to provide for

(1) [1893] 2 Q. B. 232. (2) 3 P. Wms. 151.

the child's material and moral necessities, in the rank and position to which the child by birth belongs—*i.e.*, the rank and position of the parent—the Court is, in my opinion, judicially bound to act on what is equally a law of nature and of society, and to hold (in the words of Lord Esher) that "the best place for a child is with its parent."

Of course I do not speak of exceptional cases—of which this, fortunately, is not one—where special disturbing elements exist, which involve the risk of moral or material injury to the child, such as the disturbance of religious convictions or of settled affections, or the endurance of hardship or destitution with a parent, as contrasted with solid advantages offered elsewhere. The Court, acting as a wise parent, is not bound to sacrifice the child's welfare to the *fetish* of parental authority, by forcing it from a happy and comfortable home to share the fortunes of a parent, however innocent, who cannot keep a roof over its head, or provide it with the necessaries of life.

In the present case the mother has been guilty of no misconduct towards her child. The only circumstance that could suggest unmindfulness of parental duty is her having given up her child—as I am satisfied she did—to be adopted by M'Mahon. But this she did under the pressure of her circumstances at the time, doing what was then the best both for herself and for her child. Both in parting from her child, and in seeking to take her back, she has been actuated by motives of affection. But by parting with her when she could not maintain her, nor even provide for herself unless she did so, she has not forfeited her right to resume the duties of a mother, now that she is able to discharge them. English law does not recognise the power of bindingly abdicating either parental right or parental duty. Neither the Roman nor the Indian law of adoption finds place in our jurisprudence.

The mother is now able and desirous to share with her daughter the modest but respectable position which she has gained for herself. If she were now—as she might have been if she had married a richer man—better off than M'Mahon is, the child's welfare would require compliance with the mother's demand for her return. As the case stands, before we can refuse that demand we must be satisfied that the child's welfare requires that she shall remain in

Appeal. 1899. *In re* O'Hara. Fitz Gibbon, L.J.

the position of the adopted daughter of a farmer who has 42 acres of land, rather than that she should live with her mother, the wife of a kindly respectable and childless farmer of 4 acres, who wishes her to take her natural place as a member of his family. In either situation she will be better off than when she was born; her daily life will probably differ but little, and will be much the same, but with the vital difference of her being under her mother's care if she is returned. Household work and domestic service of some sort are her inevitable lot; and, exercising the discretion *parentis patriæ* as wisely as I can, I believe that her happiness, and her welfare, are more likely to be promoted by her living with her mother, rather than with a foster father, whose feelings towards her, however kindly, are proved by his letters and sworn in his affidavit, to be measurable by the offer to give her up at any time, on payment of the cost of her past support and maintenance, which he has himself appraised at £8 10*s*. The risks of alteration of circumstances, through death or change of feeling or the like, are all less, if she be restored to her mother, than if she remains in a household to which she is attached only by the weaker tie of adoption.

In *Gyngall's Case* (1), Lord Esher (p. 244) was satisfied that if the mother had the child delivered to her, the result must be that "she would have to put the child away again." Kay, L.J. (p. 252), "taking into consideration" (among other circumstances), "the consequences of restoring her to her mother against her wish, and the life which the mother would probably be in future compelled to lead," was satisfied that a wise parent or guardian, placed in the position in which the mother was, would not, if actuated by proper feeling for the child, wish, or attempt, to take her away from where she was.

In *Elliott's Case* (2), the mother had neither the wish nor the means to support her child, and was not asking for her delivery to her in order that she might take her under her own supervision. In each of those cases, too, the age of the child, and the length of time during which she had been absent from the mother, were very different from what they are here, and these considerations had great weight in leading the Court to decline to enforce the mother's

(1) [1893] 2 Q. B. 232. (2) 32 L. R. Ir. 504.

claim. In *Gyngall's Case* (1), Smith, L.J., described the girl as "nearing the age of emancipation": in *Elliott's Case* (2), Johnson, J., referred to the fact that the application came before the Court "within six weeks of the time when the child, having reached sixteen years of age, would be able to select her own place of abode"; and having regard to the strong desire which she entertained to remain where she was, he thought it "not likely that the order of the Court would have any permanent effect."

The appellant's letter to her daughter proves that, at its date, the most affectionate relations subsisted between them; nothing but the quarrel with M'Mahon has since occurred to cause any alteration of feeling between the mother and child. There is nothing to indicate any difficulty in the way of a continuance or restoration of the same affection on both sides which certainly existed a few months ago. The nine years residence of the child where she was in *Elliott's Case* (2), and the mother's wanderings and necessities in *Gyngall's Case* (1), find no parallel in the circumstances of this case; these cases are the principal authorities which have been relied on against the mother; and they seem to me, when the facts are considered, to be authorities *e contrario* in her favor.

I think it necessary to make some observations upon the effect of the Custody of Infants Act, 1891, which, strangely enough, was not referred to in *Elliott's Case* (2). I cannot regard the Act as merely declaratory: it is intituled "an Act to *Amend* the Law relating to the Custody of Infants." It does not affect the jurisdiction formerly exercised by the Court of Chancery, but it in some respects extends, and in others it limits, the discretion of the Court; it also indicates the grounds upon which that discretion ought to be exercised, and it gives some new powers to the Court. Section 1 gives a discretion to decline to issue a *habeas corpus*, or to make an order, in any case where the parent's conduct has been such as to justify the Court in refusing to enforce the parental right to the custody of the child. The words are "*should* refuse," and whether the Court should or should not refuse must still be determined with due regard to the law as it stood before the Act.

(1) [1893] 2 Q. B. 232. (2) 32 L. R. Ir. 504.

Appeal. 1899.

In re O'Hara.

Fitz Gibbon, L.J.

Section 3 prohibits the enforcement of the parental right in any case of abandonment, desertion, or proved unmindfulness of parental duties, unless and until the parent has satisfied the Court that he is a fit person to have the custody of the child. Sect. 2 confers a new power of compelling the parent to pay expenses incurred by others in maintaining the child, where, having regard to all the circumstances, it seems just and reasonable to make such payment a condition of giving back the custody to the parent. Sect. 4 gives a new power of enforcing the parent's right of determining the child's religion in cases where the custody is with others, and it ends with a clause, general in terms, though collocated with the provision as to religion, recognizing the power of the Court to consult the wishes of the child, apparently extending the occasions on which that power may be exercised, and increasing the weight to be given to the results of its exercise.

The phrase in the Act which most nearly fits the present case is that which speaks of a parent having "allowed his child to be brought up by another person at that person's expense;" but that phrase occurs in connexion with abandonment and desertion, and is qualified by the words "for such a length of time and under such circumstances, as to satisfy the Court that the parent *was unmindful of his parental duties.*" On the construction of the Act, I hold that the surrender of a child to an adopted parent, as an act of prudence or of necessity, under the pressure of present inability to maintain it, being an act done in the interest of the child, cannot be regarded as abandonment or desertion, or even as unmindfulness of parental duty within the meaning of the Act.

The Act expressly mentions the *discretion* of the Court as the determining authority; it has not been contended that no appeal lies, and an exercise of judicial discretion involving such considerations as arise here is, in my opinion, an exceptionally worthy subject for appeal.

Under the statute, we could now order the mother to recoup M'Mahon for the expense which he incurred upon the faith of the contract which she made with him, and on which he acted in adopting the child. If she had become a rich woman, I should unhesitatingly impose that condition, as well in justice to him, as

in order to discourage any light setting aside of such an obligation. But we are bound to consult the child's welfare before anything else, and any payment which we forced the mother to make now out of her slender means, would *pro tanto* diminish her power of providing for her child.

It is but just to M'Mahon to say that I believe him, and I disbelieve the mother, wherever there is a conflict of testimony between them, either as to the circumstances of the original adoption, or as to the allegations of ill-treatment. No suggestion of ill-treatment was made until the first affidavit was filed. Then it was confined to a statement that the appellant had *heard* shortly before May 20, "that the child was not being cared for as she should be." In her second affidavit she advanced to the statement that on May 20 the child was "*then* in a most filthy condition." She has now sworn to having herself had ocular proof of gross neglect when the child was with her from Saturday to Monday, months before. Her having then sent the child back as she did, her having put this charge forward now in the manner I have mentioned, and the very terms of her own letter, would have satisfied me, even without the testimony of the doctor, and of the schoolmaster, or Mr. Justice Kenny's statement of the result of his examination of the child, or what we saw of her ourselves in Court, that the charge is, if not entirely unfounded, at best a gross exaggeration of some such uncleanliness as is not even now uncommon, though it is no longer as generally prevalent as the less squeamish literature of former days proves it then to have been, even in higher stations.

I do not like to say anything harsh of the mother, but in justice to M'Mahon I cannot forget that she not only denied her handwriting, but she also, on her oath here, denied her ability to read a single word of writing except her own name, and these denials were absolutely inconsistent with her ability to write the letter with which she was afterwards confronted. I cannot regard her as a truthful witness where she is contradicted, though I believe that her exaggerations, her untruthfulness, and her conduct in other respects too, may have been excused to herself by the intensity of her desire to get back her child, and by fear that she might not be allowed to break her agreement if she could not

Appeal. 1899. *In re* O'Hara. Fitz Gibbon, L.J.

prove that M'Mahon had failed to perform it on his side. But for our present purpose this topic is immaterial, unless it proves, which it does not, that she is not a fit person to have the custody of her child.

I think that the order appealed from must be discharged, that the cause shown must be disallowed, and that the order for the *habeas corpus* must be made absolute. But the writ should not issue for one week from the present date, in order that in the meantime, through the solicitors or otherwise, some convenient arrangement may be made for restoring the child to her mother. If such an arrangement cannot be made, the writ must issue to bring the child up on an early day to be handed over here.

No costs should be given to either party, the charges of misconduct being unfounded, and the litigation having been caused by the appellant's desire to get rid of her contract with M'Mahon without paying the small sum, by way of re-imbursement, which he, not unreasonably, demanded for its rescission.

Holmes, L.J. :—

The matter for decision in this appeal is whether a mother is entitled by means of a writ of *habeas corpus* to obtain possession of her daughter, now aged eleven, from a person with whom the child has been living for the last two years.

The mother, who is now the wife of a man named Elliott, has three children of a previous marriage. O'Hara, her first husband, was a farm labourer; and up to the time of his death in the year 1890, the family lived together. The mother, when left a widow, maintained herself by going into service; and she succeeded at or about the same time in having her children taken charge of by the Protestant Orphan Society, an institution which carries on its philanthropic work by sending the orphans to board in the houses of small farmers where, in addition to the education given them at national or other schools which they are obliged to attend, they have some of the advantages of home training.

It is unnecessary to trace the fortunes of the two elder children—a girl now aged twenty, and a boy of about fifteen, both of whom are in respectable situations, and well able to maintain themselves.

It is enough for me to say that I am satisfied by the evidence that Mrs. Elliott has always taken a parent's interest in their welfare, that she has given them such care and attention as her position permitted, and that she entertains for them a feeling of strong affection.

The youngest child, Harriet, with whom this case is conversant, continued in charge of the Protestant Orphan Society until she was nine years of age. At that time the mother was in the service of a substantial farmer named M'Mahon, a married man without a family; and she suggested to him to receive Harriet into his house and to have her brought up therein. M'Mahon did not agree to this proposal when it was first made; but after the child had been with him for some time on a kind of probationary visit, he consented to keep her altogether. There can be no doubt as to the nature of the arrangement entered into with him by the mother. I believe, notwithstanding the latter's denial, that she read the paper then signed by her; and even if she did not, she understood what was contained in it.

She knew that the M'Mahons were to be placed in the position of parents to the girl, and she allowed them to act on the assumption that she would never seek to regain possession of her. Indeed, it is most improbable that such a contingency had even presented itself to her mind. She could only be relieved from a life in service by a second marriage, and she appears to have thought that a necessary condition to such marriage was to be free from the incumbrance of children. The document was signed in October, 1897; and since that time Harriet O'Hara has been living with M'Mahon and his wife, attending school with considerable regularity, and well treated and cared for in other respects.

Her mother more than eighteen months ago was married to Elliott, and she then went to live in another part of the country. She was, however, in regular correspondence down to last May with her eldest daughter, who lives near Harriet in the service of M'Mahon's brother; and her son, during part of the intervening period, was, as the hired servant of M'Mahon, himself residing in the house with his sister.

In the month of October, 1898, the little girl stayed in her stepfather's house from Saturday to Monday. Mrs Elliott's

Appeal. 1899. *In re* O'Hara. Holmes, L.J.

letter, inviting her daughter to pay this visit, has been read in evidence, and its contents are in all respects commendable. It shows in every line that peculiar tenderness which distinguishes a mother's love from all other kinds of affection; and it is impossible to doubt that the invitation arose solely from a maternal impulse to see, and be with, her child again for a few hours. Mrs. Elliott has told us that on this occasion she noticed some indications that Harriet had not been properly cared for; but I believe that subsequent events have caused her to exaggerate, perhaps unconsciously, what at the time seemed to her to be of little or no importance. At all events, she sent the child back to the M'Mahons without referring to this matter, and she did not see her again until last May. In that month her son came home, on the expiration of the term for which he had been hired by M'Mahon; and, in consequence of some information given by him, Elliott and his wife went to M'Mahon's house.

They both swear that they then found the child suffering from the consequences of great neglect, and that the mother required that she should be at once handed over to her. This was probably followed by a good deal of strong language on both sides, resulting in a positive refusal of Mrs. Elliott's demand, and her forcible ejectment from the premises. I am satisfied that at the time of this visit Harriet O'Hara's appearance suggested want of cleanliness. At the same time I do not impute this to the negligence of the M'Mahons. It was, I think, more the result of inexperience than want of care. I am further of opinion that this was not the sole, or even the principal, reason for the mother desiring to take her back.

A considerable change had taken place in Mrs. Elliott's circumstances since she signed the document of October, 1897. She had then no prospect of being in a position to bring up the child in a house of her own. She could not have had her with herself while at service, and she believed that a second husband would not embarrass himself with the children of her former marriage. She has since discovered that this was a mistaken notion. Elliott is a kind-hearted man, without relatives or any other person having a claim upon him except his wife; and when it became unlikely that he would have children of his own, he was not merely willing, but

anxious to receive his stepdaughter. In this state of things nothing was more natural than that his wife, being, as I believe, an affectionate mother, should wish to have her youngest daughter living in her own home, and under her own care. She believed, however, as, I think, can be gathered from her letter of invitation already referred to, that she had no right to obtain possession of her without the consent of the M'Mahons. There is neither trace in the evidence, nor was it suggested in argument, that Mrs. Elliott has been influenced in this litigation by malice, ill-will, or any undisclosed cause. For these reasons I am of opinion that, apart from the way in which Harriet was treated, the mother wished to obtain possession of her from motives wholly creditable.

The appearance which the child presented in May last probably stimulated this desire, while it at the same time presented to the mind of this poorly-educated woman a legal ground for the demand then made by her. She consulted a lawyer immediately afterwards, and I infer from her evidence that she was advised that she is entitled to the custody of her daughter, whether the latter has been properly cared for by the M'Mahons or not. At least, this is the position assumed by her in the witness-box; and it is for the Court to answer (having regard, of course, to all the circumstances of the case) the question earnestly put by her three times in the course of her examination: "Is not what I am asking my right?"

Before the proceedings were begun, Mrs. Elliott's solicitor wrote a formal letter to M'Mahon, requesting that the custody of Harriet O'Hara should be given to the mother, and we have read the correspondence that followed. I am bound to say that it does not do M'Mahon much credit. Letters more free than his from the least touch of sentiment I have never read. They contain no expression, as far as I remember them, of affection for the girl, or even of a desire to keep her. He simply asks for money for her maintenance, and upon being paid therefor he is quite willing to hand her over. Indeed, he seems never to have altered his position in this respect. The amount was actually fixed by his solicitor at, I believe, £8 10*s.*, and the affidavit filed to resist the present application does not rely upon any breach of faith or misconduct on the part of the mother, or injury that may result to the daughter, but upon the

Appeal. 1899. *In re* O'Hara. Holmes, L.J.

allegation that the proceedings have been brought for the purpose of obtaining the child without payment for her support and maintenance. It was suggested during the argument that these letters did not represent M'Mahon's real feelings, and that, while he was influenced by a warm-hearted desire to promote the welfare of Harriet O'Hara, he disguised his sentiments under a mask of affected sordidness, in deference to the views of the Legislature, as expressed in the Custody of Children Act, 1891. I thought, when M'Mahon presented himself for examination, that he did not look like a man who spent his time in reading statutes; and, in answer to my question, he candidly stated that the letter in which the proposition regarding payment was first made was his own idea, and resolved upon before he saw a solicitor, or had any advice as to his legal position. However this may be, it is to be regretted that Mrs. Elliott did not pay the £8 10*s*. If she had done so she would have both obtained her child and have been a richer woman to-day. Still, her not making this payment ought not to be taken as evidence of any want of earnestness on her part. She was at the time in the hands of her solicitor, and she has shown her good faith by spending in this litigation, out of her narrow means, a much larger sum than what would have reconciled M'Mahon to the loss of his adopted daughter.

There are some other material facts to which I shall presently refer; but they will come in more appropriately after I have said a few words about the legal aspect of the case, which seems to me to be free from difficulty.

Previous to the passing of the Judicature Act a parent was held at Common Law to have, as against strangers, an absolute right to the custody of his or her child of tender years, unless he or she had forfeited it by certain sorts of misconduct. Accordingly, in such a case as the present, if the mother had before 1877 applied for a writ of *habeas corpus*, the only question to be considered would have been whether a right which *prima facie* belonged to her had been taken away by her own conduct, or by the provisions of an Act of Parliament. At the same time, it did not follow that, although she might have succeeded at Common Law, she would be permitted to retain the possession of her daughter.

The Court of Chancery, from time immemorial, has exercised another and distinguishable jurisdiction—a jurisdiction resting on the paternal authority of the Crown, by virtue of which it can supersede the natural guardianship of a parent, and can place a child in such custody as seems most calculated to promote its welfare.

The Judicature Act introduced an important change in the principles upon which an application for a writ of *habeas corpus* in a case like the present is to be dealt with. Sect. 28, subsect. 10, declares that in questions relating to the custody and education of infants the Rules of Equity shall prevail. The result of this is, that the Court to which the application is made must now place itself in the position in which the Lord Chancellor would be if the question of Harriet O'Hara's custody had arisen before him in a minor matter, and decide (1) whether the mother by her conduct has disabled herself from making the application; and, if she has not, (2) whether it is more for the welfare of the child that she should remain in the house, and under the care, of the M'Mahons.

Great reliance was placed during the argument on the Custody of Children Act, 1891; but I doubt whether the first and third sections of that statute—the only portions of it that could bear upon the custody of the child in the present case—do more than declare the existing law; and, moreover, I hope to show a little later that they give little or no assistance in determining the question now under consideration.

A mother entitled *prima facie*, as guardian by nurture, to the custody of her child may fail to make good her right to such custody, by reason of her own conduct, or, where no valid objection can be taken thereto, for reasons connected with the welfare of the child. In considering the first point—that of conduct—the Court of Chancery has always taken a much broader view than Courts of Law; nor has it confined itself to that branch of misconduct which alone is dealt with in the Act of 1891.

There is no imputation on Mrs. Elliott's moral character. She has always been an industrious and well-conducted woman; and M'Mahon, who had ample opportunities of judging while she was in his service, admitted with great reluctance that he had not a

Appeal. 1899.

In re O'Hara.

Holmes, L.J.

word to say against her. Furthermore, I am satisfied by the evidence that she has always been an affectionate mother, and that although, by the force of circumstances for which she was not responsible, she was obliged, after her first husband's death, to live at a distance from her children, she was never forgetful of her maternal obligations. It is, I think, clear that, both in placing them in the care of the Protestant Orphan Society, and also in handing Harriet over to the M'Mahons, she did what seemed to her at the time to be, and what, I have no doubt, was in point of fact, best calculated to promote their welfare. I am, moreover, of opinion that the circumstance that she allowed the girl to remain with the M'Mahons for the following eighteen months is not to be attributed to apathy or carelessness. For some time after October, 1897, she remained in service, and when her position was changed by marriage it would have been neither natural nor prudent for her to have asked the child back immediately after that event. For the sake of the child herself it was necessary for her to learn the inclination and the temper of her husband before taking such a step; and the time that elapsed was, in my opinion, not longer than what was required for the purpose of producing in her mind the assurance that she could offer her daughter a comfortable home.

Now, if my view of the character and conduct of the mother is accepted, it gets rid, I think, of the first and third sections of the Act of 1891. The first refers primarily to a case in which the parent has abandoned or deserted the child. Whatever be the distinction between the terms "abandon" and "desert" when applied to a parent in connexion with his child, both words imply in ordinary language a disregard of parental duty, and carry with them the idea of moral blame. The words that follow in sect. 1—"or has otherwise so conducted himself that the Court should refuse to enforce his right"—appear to me to show that "abandon and desert" are used in their usual signification, and that the whole section relates to a state of circumstances involving something amounting to misconduct. This is made still more evident by the third section. In it sub-head (*a*) deals with abandonment and desertion. Sub-head (*b*) deals with the parent allowing the child to be brought up by another person at the expense of the latter, "for such a length of

time and under such circumstances as to satisfy the Court that the *parent was unmindful of his parental duties.*" Here there is expressed in unequivocal language what is scarcely less clearly conveyed in the previous section; and it follows, in my opinion, that these provisions have no application to the present case, unless it is held that either in giving the child in the first instance to the M'Mahons, or in subsequently allowing her to remain with them, there was neglect or disregard of parental obligation.

Turning from the provisions of the statute to conduct regarded from the broader standpoint of the Court of Chancery, I am not aware that it has been ever held that the single fact of a parent placing another *in loco parentis* to his child precludes him from reclaiming the child if he changes his mind or circumstances alter. There are systems of jurisprudence that provide means by which a child may be adopted subject to strictly prescribed conditions and limitations. But English law does not permit a parent to relieve himself of the responsibility or to deprive himself of the comfort of his position. It would be impossible to argue, if Mrs. Elliott had become unexpectedly wealthy a few weeks after she signed the paper of October, 1897, that she could not have regained the custody of her daughter.

No doubt, the period during which a child has been in the care of the stranger is always an important element in considering what is best for the child's welfare. If a boy has been brought up from infancy by a person who has won his love and confidence, who is training him to earn his livelihood, and separation from whom would break up all the associations of his life, no Court ought to sanction in his case a change of custody. But I never heard of this principle being acted on where a boy or girl under the age of eleven has spent less than two years with the person who resists the parent's application. It is one of the advantages of youth that it can adapt itself to altered circumstances with a facility which disappears with advancing years. A young boy sent to a boarding school often goes with reluctance, and finds for the first few days his new experiences unpleasant; but he soon grows accustomed to the change, and the parent continues to feel the sorrow of separation long after it is forgotten by the son.

Appeal. 1899. *In re* O'Hara. Holmes, L.J.

The welfare of a child in a case like the present means welfare in its widest sense. Pecuniary benefit is often a very secondary consideration. The ties of relationship cannot be disregarded. "Every wise man would say"—I am quoting Lord Esher (*Reg.* v. *Gyngall* (1))—"that, generally speaking, the best place for a child is with its parent. . . . It cannot be merely because the parent is poor and the person who seeks to have possession of the child is rich that, without regard to any other consideration, to the natural rights and feelings of the parent, or the feelings and views that have been introduced into the heart and mind of the child, the child ought to be taken away from its parent, merely because its pecuniary position will be thereby bettered."

This Court, in dealing with this portion of the case, has had assistance which was not given to Mr. Justice Kenny. We have had Elliott, his wife, and M'Mahon examined orally before us, and we have had thus an opportunity of seeing what manner of persons they are. On the whole I have been favourably impressed with the mother. Notwithstanding her objection or reluctance to admit her signature—a thing very common in the case of imperfectly educated witnesses otherwise truthful—she seems to be a respectable woman of her class, tidy in person, precise in manner, and of a prudent disposition. I am satisfied that she has preserved untouched a small legacy which she received some time ago, and has added to it from her savings. She is able, I think, to train a daughter in thrift and industry, while her tact in household affairs is shown by the confidence with which she has evidently inspired her husband.

Elliott himself struck me as a specimen of the best of his class—intelligent, kind-hearted, and with a sense of humour which, I have no doubt, serves to throw a little brightness not only on his own life, but also on the lives of those about him. He is tenant of a cottage and four acres of land near the town of Newtownbutler; he supported his mother till her death, two or three years ago; he has always paid his way; he owes nothing, and he swore with evident sincerity that he is ready to settle his little farm, worth, I should say, about £80, upon his stepdaughter

(1) [1893] 2 Q. B. p. 243.

if she comes to live with him. If she were to do so she would enter a frugal, but, I should think, a not uncomfortable home. She would help her mother in the housework; in the course of time she would learn to milk the cow and make the butter. She would be near a good National School, to which, I doubt not, she would be regularly sent; and, if I am to judge by the appearance of Elliott and his wife, she would be neatly clothed and well fed with plain and wholesome food. She would, doubtless, be obliged to look forward to earning a livelihood in some walk of life by her own industry; but this is the lot of the majority of mankind, and I have no reason to think that she would not be as well fitted for the future in her mother's house as elsewhere.

Let us now see in contrast with the foregoing the position and prospects of Harriet O'Hara, should she continue to reside with M'Mahon. He is certainly a richer man than Elliott. His farm is probably worth £800, and it may be assumed that it is well stocked and cultivated. He is able to give the child better meals and more expensive dress than her mother could hope to do. But, notwithstanding this, the girl would lead very much the same kind of life in the one house as in the other. In either case she would attend the same kind of school and assist in the same kind of work both in and out of doors. Her occupations and recreations would differ but little for the present; and as regards the future, I doubt if residence with M'Mahon presents a better prospect. I am obliged to say that I have not formed a high opinion of this man. I have already referred to his letters; and his assault on Mrs. Elliott for which he was punished at Petty Sessions is an unpleasant incident. Mr. Byrne was instructed to suggest that Mrs. Elliott's true reason for desiring to have her daughter with her is that she might use her as a servant. There is no evidence of this; but I am not sure that the suggestion does not reflect what is passing through M'Mahon's own mind. We have not seen his wife; and beyond his statement that she is foolishly indulgent to the child, we know nothing of her; but as far as the husband is concerned, I doubt whether he has any notion of making Harriet O'Hara one of his family. Being aware that Mrs. Elliott had been for a long time a servant in his house, I was surprised by his statement that he has now no female servant. There is a lodger

Appeal. 1899.

In re O'Hara.

Holmes, L.J.

and a male farm-servant living with him, and, consequently, there is a good deal of woman's work. I was not then aware that it was sworn in July last by Mrs. Elliott that M'Mahon dispensed with the service of a servant woman within three months after her daughter went to reside with him, and that she has worked as the servant since, not alone in the house but in the fields. This has never been contradicted, and indeed the working both in the house and in the fields is admitted by M'Mahon. I was also struck with the way he met the question as to his future intentions towards the girl. He declined to say anything definite, and it appeared to me that his reason for so declining was that he did not intend to do anything. The Court gave him an opportunity to send in a proposal—of which I am glad to say he has availed himself, for this document quite confirms my previous impressions. It was signed in the office of his solicitor, who I am sure advised him to be as liberal as possible; and therefore it may be taken to represent the high-water mark of his generosity. It comes to this, that he will maintain the girl until she attains the age of twenty-one, or marries before that time, provided she conducts herself to the satisfaction of the Rector; and when she attains such age or marries with the approval of the Rector, she is to get £20! No farmer in Fermanagh will have a cheaper servant. I attach no importance to the vague generality that in the final disposition of his property he intends to treat her as a child of his own, and I need hardly point out that there is no means of enforcing the more definite stipulations, modest as they are. A parent's affection and moral responsibility do not depend upon the approval of a Rector, do not terminate at the age of twenty-one, and are not measured by a sum of £20.

In my opinion, looking at the matter even from the comparatively low standpoint of material and pecuniary advantage, it would be more for the welfare of this child to be with her mother and stepfather. But even if this were otherwise, even if she would be somewhat better off if left with the M'Mahons, I should still hold that it is for her welfare, as that term is understood and explained by illustrious Judges, to place her under her mother's care. There are dark shadows in every life. Neither the farmer's nor the peasant's child is free from trouble. Who will say that there

is a better antidote to "the slings and arrows of outrageous fortune" than the sympathy and help that spring from family affection? The greatest of Scottish poets, recalling probably his own childhood spent in a mud hovel built with his father's hands, has given the world a picture of the cotter's home when the labours of the week are ended, made beautiful by unity and mutual loyalty. Not far from the poet's country there is to be seen the birthplace of another famous Scotchman where, amidst mean surroundings, but learning the noblest lessons of love and duty, of self-sacrifice and piety, there grew up a family whose members, endowed with many and various gifts, had no possession more precious or more comforting than the strength of their kinship and their devotion to each other. The light of genius has made conspicuous the early days of Burns and Carlyle; but homes like theirs are to be found in rich abundance in every country. Indeed in none have family ties, knit together in poverty and suffering, borne richer fruit than in our own, as testified by the immense sums of money contributed by our emigrants for the help of parents and kinsfolk.

Being strongly impressed with the importance, in the interests of children, of maintaining, where it is possible, the bond of the family, with the duties and affections that spring therefrom, and believing that this is the view hitherto taken by the illustrious men who have administered this branch of our law, I am not prepared in this instance to make a precedent. I say *make* a precedent, because I have neither read nor heard of a case even remotely resembling the present where a writ of *habeas corpus* has been refused. The statement of it could be placed in a nutshell. A blameless woman, having been obliged by the stress of circumstances to place her child in the care of a stranger in blood and affinity, to be brought up by him, finds nineteen months later that she has a comfortable home, and her request to have the child back is met with a refusal unless she pays £8 10*s*. If the Court were to decline to aid her it would be, not because the £8 10*s*. was not paid, but because it is more for the welfare of the child to live on a 40-acre than on a 4-acre farm. Such a decision would seem to me to be unfortunate in any country, but especially unfortunate in the North of Ireland, where the

Appeal. 1899.

In re O'HARA.

Holmes, L.J.

difference of class is frequently accentuated by difference of race and creed.

There have been cases—in their circumstances, however, very unlike the present—where the Court has been obliged to refuse a parent's application; but even then, when the child was so young as Harriet O'Hara, it has insisted that he or she should be placed beyond the caprice of fortune by obliging the person who has taken upon himself a parent's duty to make an adequate provision for the child. Moreover, it invariably takes care, even when the mother is not free from moral blame, that she should enjoy access to her child at reasonable times. It is clear that if we were to refuse the mother's application there would be no means of imposing either of these conditions.

In conclusion, I desire to say a word on two matters, lest it might appear that they have been overlooked. We have not thought it necessary to see the girl; but for my own part I should have done so, had I deemed it necessary for the purpose of ascertaining facts. It would, however, be contrary to precedent for the Court to be guided in a case of this kind by her own wishes. The law has fixed the age of sixteen as the period when a female minor can choose her own residence, and little regard ought to be paid to the personal wishes of a child of eleven as against what seems to be for her welfare. The second section of the Act of 1891, which differs from the first and third in that it is not confined to cases where a parent is unmindful of his parental duties, empowers the Court to order in a case like this that the parent should pay the costs of the child's maintenance to the person in whose custody the child has been. I should not have objected, if Mr. Justice Kenny had granted the writ of *habeas corpus*, to his ordering Mrs. Elliott to pay a small sum for the child's past maintenance. But his refusal of the application rendered an appeal necessary; and if we were now to make such an order, it would only be upon the terms of M'Mahon paying the costs of the appeal. It will save expense to allow the one sum to be set off against the other.

Solicitor for Mrs. Elliott: *B. L. Winslow.*
Solicitor for M'Mahon: *C. F. Falls.*

R. D. M.

IN THE MATTER OF BARBARA MARTI, A VENDOR OF LAND.

Land Com.
1899.
Feb. 24.
July 3.

Landlord and tenant—Land Purchase Acts—Exclusive charge of quit rent—Jurisdiction of Land Commission — Incorporation of statutes—Landed Estates Court Act, sect. 68—*Land Purchase Act,* 1885, *sect.* 10—*Crown Lands Act,* 1894, *sect.* 12.

The Land Commission has jurisdiction to charge the whole of any quit rent or other perpetual Crown rent on part of the lands charged in exoneration of the residue thereof. Effect of a statute expanding powers of a statute previously incorporated with another statute.

REHEARING before three Commissioners of an application heard by Mr. Commissioner Lynch, who made an order dated the 10th of February, 1899, directing that a final order should issue for the exclusive charge of a quit-rent of £3 3*s.* 11*d.* on the land described in the second part of the schedule thereto, in exoneration of the lands described in the first part thereof.

The facts were shortly:—The vendor was selling part of the lands of Lisnadconnell, set out in the first part of the schedule; the residue of those lands set out in the second part of the schedule were part of the Brazier Estate, of which Arthur Gethin Creagh and John J. Dudley were the trustees. A quit-rent of £3 3*s.* 11*d.* had been charged on the entire of the lands, under Letters Patent of the 3rd of March, in the 19th year of the reign of Charles II. It appeared from a letter from the Quit Rent Office that the same was entered in the Crown Rental in 1800 as payable by the owners of the Brazier Estate, who in fact always paid it, not knowing that it was charged on the other lands. No apportionment of it as between the lands had been made. Upon the application by the solicitors having carriage to Mr. Commissioner Lynch that the quit-rent should be exclusively charged on the Brazier Estate, the trustees thereof claimed an apportionment; but Mr. Commissioner Lynch made the order appealed from. The trustees of the Brazier Estate required a rehearing before

Land Com. 1899.

In re MARTI.

three Commissioners, on the ground that the case did not solely involve a question of law.

T. P. Law, Q.C., for the vendor, referred to the powers to exclusively charge Crown rents given by sect. 68 of the Landed Estates Court Act, which was by sect. 10 of the Land Purchase Act, 1885, incorporated with that Act, "as if the Land Commission were therein referred to." Sect. 12 of the Crown Lands Act, 1894 (57 & 58 Vict. c. 43) extended the powers of sect. 68 of the Landed Estates Court Act to quit-rent and other perpetual rents payable to the Crown: this extended power was possessed by the Land Commission. The following cases were cited:—*Commercial Gas Company* v. *Scott* (1); *Dudley Gas Company* v. *Warmington* (2); *The Queen* v. *Wall* (3); *Ward* v. *Stevenson* (4).

M'Carthy Mahony, for the trustees of the Brazier Estate, cited Maxwell on Statutes, p. 514; *Bird* v. *Adcock* (5); *R.* v. *Smith* (6).

July 3.

MEREDITH, J.:—

The main question is one of law; it is whether Mr. Commissioner Lynch had jurisdiction to make an order charging the quit-rent exclusively on part of the lands originally charged therewith. This question depends on the construction of section 10 of the Purchase of Land (Ireland) Act, 1885, section 15 of the Land Law (Ireland) Act, 1887, and section 12 of the Crown Lands Act, 1894. Section 10 of the Purchase of Land (Ireland) Act, 1885, incorporates section 68 of the Landed Estates Court Act, 1858, and sect. 15 of the Land Law (Ireland) Act, 1887, gives the Land Commission power to *apportion* quit-rent. Then comes sect. 12 of the Crown Lands Act, 1894, which is as follows:—

"The power conferred by section 68 of the Landed Estates Court (Ireland) Act, 1858, of apportioning any Crown rent, and of charging the whole of any such rent on any part of the land charged therewith in exoneration of the remainder of such land, shall extend to any quit-rent or other perpetual rent payable to the Crown in respect of land in Ireland, and may be exercised

(1) L. R. 10 Q. B. 400.
(2) 50 L. J. M. C. 69.
(3) [1898] 2 I. R. 762.
(4) 1 New Sessions Cases, 162.
(5) 47 L. J. M. C. 123.
(6) L. R. 8 Q. B. 146.

whether the land liable to the payment of the rent is being sold by the High Court or not. . . ."

When the Crown Lands Act of 1894 was passed there were two tribunals authorized to put in force the powers of sect. 68, viz. the Land Judges' Court and the Land Commission Court. Sect. 10 of the Land Purchase Act of 1885 incorporates sect. 68 of the Landed Estates Court Act in clear terms. In the cases referred to in the section—

"The Land Commission shall have the jurisdiction and powers which are vested in the Land Judges . . . by the following sections of the Landed Estates Court Act, and those sections shall be incorporated with this Act as if the Land Commission were therein referred to, and as if the purposes of those sections included the purposes of this Act."

In my opinion the Legislature must be taken to have had in mind, when passing the Act of 1894, that these two tribunals had powers under sect. 68 of the Landed Estates Court Act. The words "the power" in sect. 12 of the Crown Lands Act, 1894, clearly mean the power then exercised by the two tribunals. Is there anything in the rest of the section to confine the extended powers to the original tribunal alone? I can find nothing; and it is clear that the power exists and is exerciseable, "whether the land liable to the payment of the rent is being sold by the High Court or not," that is, whether the land exclusively charged actually forms part of the subject-matter of the proceedings for sale or not. I do not find sufficient in the latter part of the section to cut down the general words in the earlier part. I therefore hold that Mr. Commissioner Lynch had full jurisdiction to make the order; all the other conditions are fulfilled, and the appeal, so far as regards the question of jurisdiction, fails. I will give the trustees of the Brazier Estate, as well as the vendor, their costs out of the Marti Estate, of arguing this novel question. If the trustees desire to proceed further with the question whether all the facts were before Mr. Commissioner Lynch they must file an affidavit within one week.

Solicitors having carriage: *William Fry & Son.*
Solicitors for the Brazier Estate: *O'Connor & Dudley.*

W. C. S.

Land Com. 1899. July 18.

THOMAS ARCHBOLD, Tenant; G. W. CHARTERS, Landlord (1).

Landlord and tenant—Land Law (Ireland) Acts, 1881-1896—Resumption of holding—Building ground—Evidence.

A landlord, applying for resumption, must satisfy the Court that he has a clear, settled, and definitive purpose of converting the agricultural lands which he is desirous to resume, and which are suitable for building, into building ground if and when the order for resumption has been made.

Appeal from an order of a Sub-Commission refusing an application on behalf of the landlord for the resumption of a holding for building purposes. The facts are stated in the judgment.

Healy, Q.C., and *Edward Greer*, for the tenant.

Hume, Q.C., and *Whitaker*, for the landlord.

Meredith, J. :—

At the date of the passing of the Land Law (Ireland) Act, 1881, William Anderson was in occupation of this holding, which comprises 7 acres and 2 perches, statute measure, his rent being £6 per annum. On the 16th of December, 1881, he applied to the Land Commission to fix a fair rent in respect of his holding, and the fair rent was eventually fixed at £10 10*s*.

During the first statutory term, Anderson sold his interest in the tenancy to Thomas Archbold (the tenant before the Court), who, on the 23rd of November, 1897, served an originating notice to fix the fair rent to be paid during a second statutory term. The landlord replied with a notice of application for resumption of the holding, which notice bears date the 1st of December, 1898, and which is as follows [His Lordship read the notice.] A Sub-Commission, presided over by Mr. W. F. Bailey, on the 23rd of March, 1899, dismissed the landlord's notice. The order is in

(1) Before Meredith, J., and the Hon. Gerald Fitz Gerald, Q.C., and Wrench, Commissioners.

the following terms. [His Lordship read the order.] The landlord's application is made under sect. 5 of the Land Act of 1881, which (among other things) provides that—"During the continuance of a statutory term in a tenancy, save as hereinafter provided, the Court may, on the application of the landlord, and upon being satisfied that he is desirous of resuming the holding, or part thereof, for some reasonable and sufficient purpose—having relation to the good of the holding, or of the estate, including the use of the ground as building ground . . . authorise the resumption thereof . . . &c."

The question we have to determine is whether the landlord has brought himself within the provisions of the clause to which I have referred. After the most careful consideration we are unanimously of opinion that the landlord is not at present entitled to the order he seeks. I use the words "at present" advisedly, because it was not seriously contended before us that the holding was not possible building ground. Belfast is a great and rapidly growing greater city, and the evidence satisfies us that the holding before the Court is one capable of being utilized as building ground, possibly, indeed probably, at no distant date. But does the mere fact that a holding to which the Land Acts apply, and in respect of which a fair rent has been fixed, is capable of being used by the landlord as building ground, justify the Court in making an order for resumption under sect. 5. We are of opinion that it does not. The section provides that the landlord must satisfy the Court that he is desirous of resuming the holding, or some part thereof, for some reasonable and sufficient purpose, having relation to the good of the holding, or of the estate, including *the use* of the ground as building ground. I emphasize the words "the use" of the holding, because it seems to me, upon careful consideration of the entire clause, that these words afford a key to the decision of the present case. I think the expression "the use" means actual user, as distinguished from possible user. I entirely dissent from the view that the landlord is bound to prove that he himself contemplates the erection of buildings, or that he should be prepared with a scheme for laying out the ground as building ground. A landlord may use ground as build-

Land Com. 1899.

ARCHBOLD, *Tenant*; CHARTERS, *Landlord.*

Meredith, J.

ing ground, by letting it on building leases, just as effectively as if he undertook the risk himself of erecting houses upon it; and as to a scheme for laying out ground, no landlord need be without one, as the scheme produced before us, which was admittedly prepared for the rehearing, and which covers the ground in question with thirty elegant villa residences, sufficiently demonstrates. Nor do I think that the landlord must come prepared with a definite offer from A. B. or C. D. to take the ground, or part of it, for building purposes. The inadequacy of any such restriction is again demonstrated by the suggestions of applications or negotiations, in reference to this ground, made in the interval between the order of the Sub-Commission and the rehearing. But I do hold, and we are all of opinion, that the landlord must satisfy us that he has a clear, settled, and definitive purpose of converting the agricultural land which he is desirous to resume, and which is suitable for building upon, into building ground, if and when the order for resumption is made. In other words, I think the landlord must establish that his settled purpose is to use the land as building ground as soon as it has been freed from the tenancy in respect of which a fair rent has been fixed. The landlord must satisfy the Court that he requires the land for *use* as building ground, and not merely that he desires to have it in his own hands, available for building ground, if he receives a sufficiently tempting offer to deal with it as such. The entire evidence in the present case satisfies us that the landlord has no definite settled purpose, no fixed determination to use this holding at present, or even in the immediate future, as building ground. He desires to get rid of the tenancy of Archbold, with all its possibilities, and to be in a position to deal with the land as building ground, if he thinks fit. There would be nothing inconsistent with his present attitude and purpose if he retained the land in his own hands for five or ten years, and then, finding Belfast rapidly spreading in the direction of the holding, determined to use it himself as building ground, or to set it on building leases. We do no injustice to the landlord by holding that his present application is premature; for if at any time during the statutory term he can satisfy the Court that he really desires to use the holding as building ground he can

make a fresh application, and this order will be no bar to his proceeding. At present his application is premature, and must be dismissed with costs.

Land Com. 1899.

ARCHBOLD, *Tenant;* CHARTERS, *Landlord.*

Solicitor for the tenant: *R. J. Porter.*

Solicitors for the landlord: *Campbell & Harden.*

W. C. S.

WILLIAM PEDDIE, JAMES KERR, AND GEORGE LA GRUE *v.* SAMUEL KYLE ( ).

Q. B. Div. 1899.

April 18.

Appeal.

May 1.

(1898. No. 18,266.)

Practice—Joinder of plaintiffs—Libel—Separate causes of action—Motion to stay further proceedings—Order XVI., Rule 1.

Where a libel is published in the same words and in the same document of different persons, they cannot be joined as plaintiffs in one action of libel.

Smurthwaite v. *Hannay* ([1894] A. C. 494) followed; *Booth* v. *Briscoe* (2 Q. B. D. 496) considered and explained.

MOTION on behalf of the defendant that all further proceedings be stayed, and the action dismissed, on the ground that the plaintiffs should have brought separate actions in respect of their respective claims, and that the present action is an abuse of the process of the Court.

The defendant, as the honorary secretary of the Masters' Association of printers in Dublin, in the month of November, 1898, issued a notice to the members of the association announcing that the employees of one of the members had gone out on strike, and giving the names of the men who had gone on strike. Among these names were the names of the three plaintiffs. The plaintiffs alleged that they had not gone out on strike, but that for reasons

(1) Before JOHNSON, MURPHY, and GIBSON, JJ.

Q. B. Div. 1899.

PEDDIE v. KYLE.

personal to themselves they had at that date left their employment. The three plaintiffs joined in one action of libel. Subsequently to the issue of the writ the plaintiff Peddie died, and the action was, as to him, discontinued. The present motion was then instituted.

Campbell, Q.C., and *Meredith*, for the defendant :—

These plaintiffs cannot join in one action. Different considerations apply to each of them. The measure of damages in each case would be different. As regards La Grue we wish to plead privilege. As regards Kerr it is a mere question of damages, and we wish to move to remit. Order XVI., Rule 1, deals with parties merely and not causes of action. Here the causes of action are separate. [They cited *Smurthwaite* v. *Hannay* (1)].

Healy, Q.C. (*O'Shaughnessy, Q.C.*, with him), for the surviving plaintiffs :—

Two parties having a joint and common cause for complaint can join in one action. There is no difficulty as to pleading or as to the jury finding a verdict. Here you have as plaintiffs workmen belonging to the same class, earning the same wages, and defamed in the same document. [He cited Odgers on Libel and Slander, pages 438 and 547, and *Booth* v. *Briscoe* (2)].

JOHNSON, J. :—

We have heard this motion at some length. The alleged cause of action is contained in a letter written by the defendant, and containing the names of the men alleged to have gone out on strike, among them being the names of the plaintiffs in the action. The exact terms of the letter, as set out in the statement of claim, are :—" I herewith enclose a list of the names of the men who have gone out on strike." If that be a libel it is a separate tort against each of the plaintiffs. Then, what community of interest is there between these plaintiffs? They have separate causes of action, and the circumstances and measure of damages of each individual would be different. Under the old system of pleading it would

(1) [1894] A. C. 494. (2) 2 Q. B. D. 496.

have been impossible to join these plaintiffs in one action. Now Order XVI., Rule 1, of our present rules, deals with joinder of parties, not with joinder of causes of action by several plaintiffs. It provides that—"All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative." In this case "the right" is not the right of the plaintiffs, but the right in each individual plaintiff: neither is it a joint or alternative right; and that it is not the right alleged to exist in the plaintiffs severally within the meaning of this rule is explained by Lord Herschell in *Smurthwaite* v. *Hannay* (1). I think it is clear that, if this were any other tort and not a libel, these plaintiffs could not be joined. Mr. Healy has pressed us with the case of *Booth* v. *Briscoe* (2). But that case is explained by its own special facts and circumstances. There the libel imputed to the plaintiffs, as joint trustees of a charity, mismanagement as such trustees of their trust. The defendant did not object to these trustees joining as plaintiffs and submitted to it. One verdict for 40*s.* was given for all the plaintiffs, and no objection was made to that until the case was in the Court of Appeal on a new trial motion. Then the defendant's complaint was that the verdict was against evidence, and that the learned Judge at the trial ought to have held the occasion privileged. Failing in both these objections it was then contended for the defendant in the Court of Appeal, that the damages ought to have been severally assessed, because although the plaintiffs were libelled as joint trustees in the management of the subject of their trust, yet it was in law a separate tort as to each plaintiff. The Court, however, considered that the plaintiffs had no objection to take the 40*s.* and divide it amongst themselves, and that the defendant had not shown that he was injured by it, and had no right to complain.

The motion must be granted, with liberty to amend.

MURPHY and GIBSON, JJ., concurred.

J. M°G.

(1) [1894] A. C. p. 500. (2) 2 Q. B. D. 496.

Appeal. 1899.

PEDDIE v. KYLE.

May 1.

The plaintiffs appealed to the Court of Appeal (FitzGibbon, Walker, and Holmes, L.JJ.).

O'Shaughnessy, Q.C., and *Healy*, Q.C., for the appellant.

Campbell, Q.C., and *Meredith*, for the respondent.

THE COURT OF APPEAL dismissed the appeal with costs, varying the order of the Queen's Bench Division as follows:—

> "It is ordered that the said order of the Queen's Bench Division, dated the 18th day of April, 1899, do stand discharged, save so far as it orders the payment of £6 6*s.* costs by the plaintiffs to the defendant. And it is hereby further ordered that all further proceedings on foot of the writ in this action be stayed for fourteen days from the date of this action, and that the plaintiffs be at liberty within the said fourteen days to amend the said writ by striking thereout the names of William Peddie and James Kerr, and proceeding with the action with the said Frederick George La Grue as plaintiff, and the said Samuel Kyle as defendant (1), and in the event of such amendment not being made as aforesaid within the said fourteen days it is ordered that the said writ be set aside with costs, &c., &c.

Solicitor for plaintiff: *Hanmore.*
Solicitor for defendant: *F. Meredith.*

G. Y. D.

(1) The plaintiffs were allowed to elect in the name of which plaintiff the action should be carried on.—REP.

GATELY *v.* H. & J. MARTIN, LIMITED (1).

(1898. No. 16,951.)

Q. B. Div. 1899. May 8.

Adjoining buildings — Right to lateral support — Prescription — Evidence — Knowledge of support.

Where an easement of support is claimed by the owner of one of two adjoining houses, which have not a common origin, against the owner of the other, it must be shown that the owner of the servient tenement knew, or had the means of knowing, that his house was affording support to the other.

MOTION on behalf the plaintiff for an order that the judgment entered for the defendant be set aside, and that judgment be entered for the plaintiff for £150 damages and for the costs of the action and this motion, or in the alternative for a new trial, upon the ground that on the findings of the jury, as entered, the judgment directed for the defendants was wrong, and upon the ground of misdirection.

This action was tried before the Hon. Mr. Justice Kenny and a common jury of the city of Dublin on the 9th, 10th, and 14th of February, 1899. It was brought to recover damages for—1. Wrongfully depriving plaintiff of the support of an adjoining house; 2. Negligently removing the adjoining house; 3. Trespass; and 4. Wrongful removal of a wall and chimney on plaintiff's premises.

The plaintiff was the owner and occupier of the house No. 35, Little Denmark-street, Dublin, which she held under a lease dated the 18th of August, 1876, for a term of thirty-one years from the 25th March, 1876, at the yearly rent of £30. In these premises, and in No. 34, the plaintiff for years carried on the business of a dealer in furniture. In the early part of 1898, the Henry-street Warehouse Company acquired the premises Nos. 36 and 37 in the

(1) Before PALLES, C.B., and GIBSON and MADDEN, JJ.

Q. B. Div. 1899.

GATELY v. MARTIN.

same street immediately adjoining those of the plaintiff, and proceeded to take down the former for the purpose of enlarging their business establishment. Their contractors for these works were the defendants, and the causes of action were conversant with the removal of No. 36 and the excavations for the laying of the foundations of the new buildings on its site. The following are the questions submitted to the jury, and their answers thereto:—(1.) Was the plaintiff's house injured by any excavations or removal of soil on No. 36 by the defendants? No. (2.) Were such removal or excavations the sole cause of the injury to No. 35? No. (3.) Was the side wall supported by the buildings of No. 36? Yes. (4.) Was it thus supported for twenty years before this action? Yes. (5.) Was the enjoyment of this support open and notorious and without concealment during that period? The jury were unable to agree upon this question, and returned no answer to it. (6.) Was such enjoyment uninterrupted during that period? Yes. (7.) Was the plaintiff's house injured by the removal of No. 36? Yes. (8.) Was such removal the sole cause of the injury? Chief cause. (9.) Were the defendants guilty of negligence in the pulling down of No. 36? No. (10.) Did the defendants pull down the plaintiff's chimney stack? Yes. (11.) If so, was it done with the plaintiff's leave? Yes. The jury were further asked to assess the damages in the event of the verdict being ultimately entered for the plaintiff. They assessed the plaintiff's damages at £150.

On the above findings, and by direction of the learned Judge, the jury found for the defendants. The learned Judge gave judgment for the defendants against the plaintiff.

No evidence was given at the hearing that the owners of the house No. 36 knew, or reasonably could have known, that No. 36 was affording support to No. 35 for the twenty years preceding the action. The plaintiff's counsel upon this motion did not seek to set aside the findings of the jury, but contended that upon the answers to questions Nos. 3, 4, 6, 7, and 8 the plaintiff was entitled to have the verdict entered for her for £150, or in the alternative, that as the jury could not agree upon and had left unanswered question No. 5 a new trial should be directed.

Blood, Q.C., and *O'Rorke* (with them *Drummond, Q.C.*) for the plaintiff :—

We claim a right to lateral support, acquired by prescription after twenty years : *Lemaitre* v. *Davis* (1). Here the houses have stood for over twenty years, and the jury have found that injury has been caused to the plaintiff's house by the removal of the adjoining house by the defendants. We are entitled to maintain the action, even though no negligence is found by the jury : *Latimer* v. *The Official Co-operative Society (Limited)* (2) ; *Dalton* v. *Angus* (3). The existence of the fact of support should be inferred from the position of the houses. [They referred to the following additional cases : *Solomon* v. *The Master, &c., of Vintners* (4) ; *Humphries* v. *Brogden* (5) ; *Trower* v. *Chadwick* (6) ; *Richards* v. *Rose* (7).] If the Court refuse to enter judgment for the plaintiff, still, as the jury have left unanswered question No. 5, we are entitled to a new trial.

Serjeant Dodd and *Brunskill*, for the defendants :—

The only fact proved to establish the right to support is that the two houses have stood together for over twenty years. No evidence is given that the owners of No. 36 knew or could have known of the fact of support : *Butler* v. *Bradstreet* (8) is exactly in point. There the same questions were left to the jury, and the same answers given. Here there is no evidence of knowledge or means of knowledge of the fact of support, so as to bring the case within *Lemaitre* v. *Davis* (1). [They also referred to *Angus* v. *Dalton* (9) and *Kempston* v. *Butler* (10).]

The judgment of the Court was delivered by—

PALLES, C.B. :—

We are all of opinion that the verdict for the defendants should stand. The matter is very tersely put by the learned

(1) 19 Ch. D. 281.
(2) 16 L. R. Ir. 305.
(3) 6 App. Cas. 740.
(4) 4 H. & N. 585.
(5) 12 Q. B. 739.
(6) 3 Bing. N. C. 334.
(7) 9 Ex. 218.
(8) (1891) unreported.
(9) 4 Q. B. D. 162.
(10) 12 Ir. C. L. R. 516.

Q. B. Div. 1899.

GATELY v. MARTIN.

Palles, C.B.

Judge in the words in which, in his report, he sums up his reasons for his direction :—

> "I was of opinion (although I left the question to the jury) that the evidence did not sustain the plaintiff's claim to the right. There was nothing to show whether the two houses had been built by a common owner or whether they had a common origin in the sense of having been built at the same time. They had unquestionably existed side by side for a considerable number of years, but no evidence was given that either extrinsically or intrinsically there were indications of support being afforded by either house to the other. Furthermore, I was of opinion that the easement claimed was, on the facts of the case, of such a character that the owner of the servient tenement could not reasonably be expected to be aware of the support being given by his house, and that the right to support could not be inferred as a matter of law."

The case is within the principle of *Bradstreet* v. *Butler* (1), decided some years since in the Exchequer Division, and which binds us. As, however, the matter has been fully argued, we desire to say that *Bradstreet* v. *Butler* (1) is not only consistent with *Lemaitre* v. *Davis* (2), but is a necessary consequence of that case and *Dalton* v. *Angus* (3). *Dalton* v. *Angus* (3) determines that, knowledge or means of knowledge of the fact that the one building actually supports the other is essential to the nature of the easement. Lord Selborne, at p. 801, says :—

> "The inquiry on this part of the case is, as to the nature and extent of the knowledge, or means of knowledge, which a man ought to be shown to possess, against whom a right of support for another man's building is claimed. He cannot resist or interrupt that of which he is wholly ignorant."

Now my view is that the Prescription Act only applies in cases where but for the Act a lost grant would be presumed, and knowledge or means of knowledge of the material facts constituting the easement must be brought home to the defendant. In *Lemaitre* v. *Davis* (2), Hall, V.-C., at p. 291, says :—

> "In a state of things, where the origin of these two buildings goes so far back, it is very difficult to deal with the case, it being almost

(1) (1891) unreported. (2) 19 Ch. D. 281. (3) 6 App. Cas. 791.

impossible to prove anything on the one hand or the other affirmatively; therefore the conclusion which I come to is that the enjoyment would not be of right if it was *clam*, but I think the evidence shows that the right was open—that each proprietor of the two tenements knew of the existence of his neighbour's cellar; therefore, as a matter of fact, I hold, so far as it may be necessary, that the enjoyment of the right has not been *clam*, or otherwise than open; an open enjoyment within the meaning of the Act."

There the enjoyment of the easement was open and known. In the present case there is no evidence to show that it was known or reasonably could have been known to the owner of the alleged servient tenement that his house, in fact, afforded support to that of the plaintiff. The verdict must stand, and the motion be refused with costs.

Solicitor for the plaintiff: *R. H. Morris.*
Solicitors for the defendants: *A. & J. Robinson.*

J. M°G.

MAHONY *v.* THE WATERFORD, LIMERICK, AND WESTERN RAILWAY COMPANY (1).

Through booking of goods to be carried over several railways—Condition limiting liability of contracting Company to wilful misconduct of its servants on its own line—Validity of the condition—Onus *of proof.*

Where there is a through booking of goods which necessitates their being carried over lines owned by different companies, a condition limiting the liability of the contracting company to wilful misconduct of its servants on its own line is valid. When the goods are damaged in transit the *onus* of proving that they were not damaged by the wilful misconduct of the servants of the contracting company on its line lies on the contracting company.

This was a case stated by Mr. Justice Murphy on the hearing of a civil bill appeal heard before him at the Mayo Spring Assizes.

(1) Before PALLES, C.B., and GIBSON and MADDEN, JJ.

Q. B. Div. 1899.

MAHONY *v.* W. L. & W. RAILWAY CO.

1899. The following is the case, as stated by the learned Judge:—

This was an action brought to recover damages from the defendant Company, as carriers, for breach of contract and negligence in the carriage of certain goods delivered to them by the plaintiff. A copy of the civil bill is set out in the first schedule hereto, and shall be deemed to form part of this case (1).

The County Court Judge gave a decree for £21 18*s.* 6*d.*, and from that decision the defendant Company appealed.

(1) BY THE COUNTY COURT JUDGE.

County of Mayo; Division of Swinford.

MARGARET MAHONY, of Swinford, in the County of Mayo, Widow, *Plaintiff;*
THE WATERFORD, LIMERICK, AND WESTERN RAILWAY, having an office or place of business at Swinford, in the said County and Division, Carriers, ... *Defendants.*

The defendants are hereby required personally to appear at the County Court to be held at Swinford in the said County, on the 12th day of October, 1898, to answer to the plaintiff's bill for £21 18*s.* 6*d.* damages sustained by plaintiff, for that the plaintiff, on the several dates mentioned on the back hereof, consigned butter and eggs to one John Kneafsey of Wigan and Bradford, which the defendants contracted to deliver in good condition, but on the contrary failed to do so, and delivered said butter and eggs in an unsaleable condition, and in breach and violation of their contract, and through their negligence, delivered the same in a broken, damaged, and useless condition. Particulars on other side.

Dated this 26th day of September, 1898.

JOHN GARVEY, *Solicitor for the plaintiff,*
Ballina.

INDORSEMENT.

1898.		£	*s.*	*d.*
8th June.	To one box butter containing 60lbs. at 1*s.* per lb.,	3	0	0
15th ,,	To one box butter containing 140lbs. at 1*s.* per lb.,	7	0	0
27th July.	To one case of eggs 2½ hundred broken, . .	1	0	0
10th Sept.	To six hundred of eggs broken, ...	2	14	0
	Box, ...	0	2	6
14th Sept.	To 18 hundred of eggs, broken, ...	8	2	0
		£21	18	6

It was proved before me that the plaintiff, on the 8th day of June, the 15th day of June, the 27th day of July, on the 10th day of September, and on the 14th day of September, of the year 1898, delivered certain boxes of butter and eggs to the defendant Company, consigned to John Kneafsey, at Wigan and Bradford, in England.

It was proved that all the goods were booked through by the plaintiff with the defendant Company. It was proved that the defendant Company had two rates for the conveyance of goods—one the ordinary rate, when they took the ordinary liability of the carriers; the other the reduced rate, or owner's risk rate, adopted when the sender relieved them from all liability of loss, damage, or delay, except upon proof that the same arose from wilful misconduct on the part of the Company's servants. It was proved that the plaintiff was aware of the two rates, and in every case had sent the goods by the reduced or owner's risk rate, and had signed the consignment note containing the conditions applicable to that rate, a copy of which is set out in the second schedule hereto, and shall be deemed to be part of this case.

It was proved that the goods delivered to the defendant Company on the 8th day of June, the 15th day of June, and the 27th day of July were delivered to them by the plaintiff in good condition at Swinford, and carried by them over their system to Claremorris, where they were handed over by them to the Midland Great Western of Ireland Company, who carried them to Dublin, and there handed them over to the London & North-Western Railway, who delivered them to the consignee at Wigan. When delivered to the consignee at Wigan the goods were found to be in a damaged condition. I found that there was no evidence of any wilful misconduct on the part of the defendant Company, or that the goods had been injured by them on their system between Swinford and Claremorris; but I found there had been wilful misconduct on the part of some other persons between Claremorris, where the goods passed out of the defendant Company's control, and Wigan.

It was proved that goods booked through by the plaintiff to John Kneafsey at Bradford were delivered to the defendant Company on the 10th September and the 14th September, at

Q. B. Div. 1899.

MAHONY v. W. L. & W. RAILWAY CO.

Swinford, and were carried by them to the end of their system at Waterford, and were there handed over by them to the steamers of the Great Western Railway Company, who carried them to Milford, where they were transferred to the Lancashire and Bradford Railway Company, and delivered by them to the consignee at Bradford. It was proved that these goods were delivered in good condition by the plaintiff to the defendant Company at Swinford, and that when they were delivered to the consignee at Bradford they were in a damaged condition. I found that the damage was caused by wilful misconduct. No evidence was offered by the plaintiff or by the defendant Company to show where in the course of the journey, or by whom, the damage was caused.

The defendant Company relied on two conditions on the owner's risk rate consignment note—the fourth condition and the fifth condition. It was contended for the defendant Company that, as regards the goods delivered to them by the plaintiff on the dates mentioned in the civil bill, they were protected by both of these conditions, and could not be held liable to the plaintiff (1).

I decided to state a case.

The questions for the Court are whether, on the facts which

(1) The following is the form of the heading of the consignment note, and the conditions Nos. 4 and 5 relied on:—

[The Invoicing Clerks must enter on the Invoice every particular given on this Note.]

WATERFORD, LIMERICK, AND WESTERN RAILWAY.

CONSIGNMENT OF GOODS OR PARCELS TO BE CARRIED AT OWNER'S RISK.

Pro. No.

The Waterford, Limerick, and Western Railway Company hereby give Notice that they have two rates for the conveyance of certain articles; one, the Ordinary Rate, when they take the ordinary liability of the Carrier; the other a Reduced Rate, adopted when the Sender relieves them of all liability of loss, damage, or delay, except upon proof that such loss, damage, or delay arose from wilful misconduct on the part of the Company's Servants.

To the WATERFORD, LIMERICK, AND WESTERN RAILWAY COMPANY.

STATION, 189

RECEIVE and forward the undermentioned Goods or Parcels, to be carried at the Reduced Rate, below the Company's Ordinary Rate, in consideration

have been proved before me, the defendant Company are protected by these conditions, or either of them, and whether they are liable to the plaintiff to all or any part of the claim.

The defendant Company, in any event, shall pay the costs of the case stated when taxed.

The damage sustained by injury to goods sent by Waterford I find to be £10 18*s.* 6*d.*, and damages sustained by injury to goods sent by Dublin I find to be £11.

Dated 5th day of May, 1899.

J. MURPHY.

Henry, Q.C., and *Coll*, for the defendants:—

The fourth and fifth conditions on the consignment note protect the defendants as to the goods carried by them to Claremorris. No misconduct as to these goods is found against them. The proviso to the 7th section of the Railway and Canal Traffic Act, 1854, enables them to make these conditions. As to the fourth condition, see *Gallagher* v. *The Great Western Railway Co.* (*Ireland*) (1). As to the fifth condition, the defendants are entitled to limit their liability to anything happening on their own line: *Aldridge* v. *The*

whereof I undertake to relieve the Waterford, Limerick, and Western Railway Company, and all other Companies over whose Lines the Goods or Parcels may pass, from all liability in case of damage or delay, except upon proof that such loss, detention, or injury arose from wilful misconduct on the part of the Company's Servants. I also agree to the Conditions and Regulations on the back of this Note. *Via* WATERFORD, MILFORD, AND GREAT WESTERN RAILWAY.

Signature of Sender or his Representatives,
Address,

NOTE.—Goods or Parcels which may be required "to wait order" at any particular Station, must be so consigned on this Note.

The WATERFORD, LIMERICK, AND WESTERN RAILWAY COMPANY hereby give Notice of the following Conditions on which they receive Traffic for conveyance. No servant of the Company has authority to add to or vary the terms of these Conditions:—

RULES AND CONDITIONS.

1. In case of all goods for which a contract note with two rates of carriage shall be offered to the customer, the Company give him the alternative of

(1) Ir. R. 8 C. L. 326.

Q. B. Div. 1899.

MAHONY v. W. L. & W. RAILWAY CO.

Great Western Railway Co. (1); *Zunz* v. *South-Eastern Railway Co.* (2). As to the balance of the goods, there is no presumption that the injury took place on our line more than any other. Where a plaintiff relies on negligence he must prove it affirmatively: *Smith* v. *Midland Railway Co.* (3). A plaintiff must *a fortiori* prove wilful misconduct.

[They referred to the following cases:—*Haynes* v. *The Great Western Railway Co.* (4); *Woodgate* v. *The Great Western Railway Co.* (5); *Stevens* v. *The Great Western Railway Co.* (6); *Bolland* v. *The Waterford, Limerick, and Western Railway Co.* (7); *Watkins* v. *Rymbill* (8); *Henderson* v. *Stevenson* (9); *Turner* v. *South-Eastern Railway Co.* (10); *The Great Northern Railway Co.* v. *M'Carthy* (11); *White* v. *The Great Western Railway Co.* (12).]

Richards and *Monahan*, for the plaintiff:—

There is an indivisible contract here by the defendants to carry the whole way. This fifth condition is, then, unreasonable, because,

adopting either rate (at the *full* rate, which will be charged when the contrary is not expressed, the Company undertake the ordinary duties of carriers for hire, subject to such just and reasonable conditions as may be printed hereon and their legal rights); at a *reduced* rate the Company carry at owner's risk, and are exempt from all liability not occasioned by the wilful misconduct of their servants acting within the scope of authority.

5. Through traffic has, for the public convenience, been arranged to places outside and beyond the Company's Line, but the Company will not be liable in respect of traffic outside or beyond their own Railway and the several stations thereof, whether through booked or otherwise; they undertake to forward, if practicable, traffic destined for places outside their limits to another Company, or to the ordinary carriers or messengers of the district, whereupon their responsibility will cease. Any money received by them for conveyance of traffic outside their limits will be received only for convenience of customers, and to be paid to the parties entitled thereto.

(By Order),

JOHN J. MURPHY, *Secretary*.

(1) 15 C. B. (N. S.) 582.
(2) L. R. 4 Q. B. 539.
(3) 57 L. T. (N. S.) 813.
(4) 41 L. T. (N. S.) 436.
(5) 51 L. T. (N. S.) 826.
(6) 52 L. T. (N. S.) 324.
(7) 31 Ir. L. T. R. 62.
(8) 10 Q. B. D. 178.
(9) L. R. 2 H. L. Sc. 470.
(10) 17 W. R. 1096.
(11) 12 A. C. 218.
(12) 2 C. B. (N. S.) 7.

being liable as carriers the whole way, they refuse liability except on their own line. The *onus* of proving that the damage did not occur on the defendants' line lies on the defendants. The plaintiff has shown that he gave them the goods in good condition, and they arrived damaged: *Kent* v. *The Midland Railway Co.* (1).

At the conclusion of the arguments the Court intimated that they were in favour of the defendants as to the goods carried to Claremorris. Their considered judgment was, therefore, confined to the liability of the defendants for the other goods.

Cur. adv. vult.

May 17.

PALLES, C.B.:—

There are two questions to be decided:—1. Whether the 5th condition which exempts the Company from liability for loss or injury occurring outside or beyond their own railway, is valid, or not. As to that I shall say no more than having regard to the lapse of time since the decision in *Aldridge* v. *The Great Western Railway Company* (2), which, as far as I can see, has never been dissented from, it is not competent for us in a case like the present from which an appeal lies, to refuse to follow it. *Zunz* v. *South Eastern Railway Company* (3) does not, in my view, determine the question. There was the essential difference between that case and the present, that the portion of the line on which the injury there occurred was in a foreign country, and the contract so far as related to the carriage through that country was not within the Act of 1854 at all.

The other question is one which was argued before us at some length in *Curran* v. *The Midland Great Western Company of Ireland* (4), and which it was not necessary to decide then. There is a contract for the through carriage of goods from Swinford to some place in England, over the lines of various railway companies. There is a condition that the Company is not to be liable except for the wilful misconduct of its servants on its own line. It is proved as a fact that there was wilful misconduct, and that the goods were thereby damaged; but it is not proved that such

(1) L. R. 10 Q. B. 1.
(2) 15 C. B. (N. S.) 582.
(3) L. R. 4 Q. B. 539.
(4) [1896] 2 I. R. 183.

Q. B. Div. 1899.
MAHONY v. W. L. & W. RAILWAY CO.
Palles, C.B.

misconduct occurred on the line of the defendants, the contracting Company. It is plain that the question involved is one of the *onus* of proof merely. In my opinion it lay upon the Company to prove that the damage did not occur on their line. I rest my judgment on this:—although it is the general rule of law that it lies upon the plaintiff to prove affirmatively all the facts entitling him to relief, there is a well known exception to such rule in reference to matters which are peculiarly within the knowledge of the defendant. In such cases the *onus* is shifted. All the decisions are referred to in Taylor on Evidence, sect. 376A, in which he says:—"The second exception to the above-named general rule is that where the subject-matter of the allegation lies peculiarly within the knowledge of one of the parties, that party must prove it, whether it be of an affirmative or negative character, and even though there be a presumption of law in his favour." He then proceeds to cite cases in which even the ordinary presumption against the commission of criminal acts was held not to be sufficient to prevent the application of this exceptional rule. Were there ever a case in which that rule should be applied it ought to be in such a case as the present; otherwise it would be impossible for the plaintiff ever to recover. The contract is that the defendants shall carry the goods throughout the entire journey. Therefore the successive companies through whose agency that carriage is effected are the defendants' agents for the carriage. The defendants, therefore, either by themselves or their agents, have throughout the care and custody of the goods and full control over them. If they sustain injury, the line on which such injury occurred must be known to the defendants or their agents, provided due care be used in checking their state and condition when they are transferred from one company to another; and records ought to be kept of injuries such as those in this case, which we must take it were not usually incident to their carriage. All such facts must be unknown to the plaintiff. Upon principle alone therefore, I should be in favour of the plaintiff upon this question, but, in truth the very point is decided by *Kent* v. *The Midland Railway Company* (1). There there was a condition that the Company

(1) L. R. 10 Q. B. 1.

should not be liable for damage taking place off their line; and Lord Blackburn says:—"The condition is that the Company 'do not hold themselves responsible for loss off their lines.' That, again, I assume in favour of the defendants, means that the plaintiff is carried on the condition that the defendants are not to be held responsible by him for loss occurring off their lines. Did the loss happen 'off the defendants' line? *The burthen of proof is on the defendants to show this.*"

The second question, therefore, must be ruled in favour of the plaintiff.

Solicitor for the plaintiff: *John Garvey.*
Solicitor for the defendants: *John O'Connor.*

J. M°G.

IN THE MATTER OF THE FINANCE ACT, 1894; AND IN THE MATTER OF THE ESTATE DUTY ON PROPERTY PASSING ON THE DEATH OF THE REV. GEORGE STUDDERT (1).

Revenue—Estate duty—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *sect.* 5, *sub-sect.* (2)—"*Settled property.*"

On the marriage of A. and B. trust funds were settled in trust as to the income thereof for B., the husband for life, and after his death for A. for life, and after the death of the survivor, then in the event which happened of there being no children of the marriage in trust as to the capital of the funds for such person or persons as A. should appoint.

A. died in the lifetime of B. On the death of A. the Inland Revenue claimed and were paid estate duty on the value of her reversionary interest in the capital of the trust funds. On B.'s death they claimed estate duty on the actual amount of the capital:—

Held, that the duty paid on A.'s death was in respect of "settled property" within the meaning of sect. 5, sub-sect. (2) of the Finance Act, 1894, and that

(1) Before PALLES, C.B., and GIBSON and MADDEN, JJ.

Q. B. Div. 1899.

In re FINANCE ACT, 1894, and STUDDERT.

credit for it should be given as regards the duty, which would otherwise have been payable on the death of B.

The Attorney-General v. *Dodington* ([1897], 1 Q. B. 722; [1897] 2 Q. B. 373) discussed and applied.

APPEAL by the executors of the Rev. George Studdert from the decision of the Commissioners of Inland Revenue with respect to the estate duty payable on his death upon certain trust funds comprised in his marriage settlement. The facts are fully stated in the judgment of the Lord Chief Baron.

Price, Q.C., and *Meredith*, for the petitioners:—

We do not contest the duty payable on the death of Mrs. Studdert. We contend that having, on her death, paid duty on the value of the whole fund, less by the value of the life interest, we are not compellable to pay a second duty on the value of the whole on the death of her husband. It was not the intention of the Legislature that duty should be payable twice over on the same estate. This appears from a number of sections, and sect. 5, subsect. 2, does not stand alone in this respect. We rely upon this latter section, and suggest that it was intended to prevent the possibility of two duties being imposed during the continuance of a settlement, where there are two life interests in succession. No doubt the expectancy passed on the death of the wife; but nothing passed on the death of her husband—his interest merely ceased. He was not "competent to dispose" of the property. Mrs. Studdert's interest in expectancy is part of the settled property; and, therefore, duty having been paid in respect of it, duty cannot become again payable until the death of some person competent to dispose of the property who dies after Mrs. Studdert. *The Attorney-General* v. *Dodington* (1) is a distinct authority in our favour. [Counsel also referred to *The Attorney-General* v. *Wood* (2), and *Earl Cowley* v. *Inland Revenue Commissioners* (3).]

Matheson, Q.C., and *Charles MacDermot*, for the Inland Revenue Commissioners:—

The Crown is entitled to duty on the death of the Rev. George

(1) [1897] 1 Q. B. 722; [1897] 2 Q. B. 373.

(2) [1897] 2 Q. B. 102.

(3) [1899] 1 A. C. 198.

Studdert. The claim is made under sect. 1, and sect. 2 (1) (*b*), and it is to be measured under sect. 7 (7) (*a*). The duty paid on the death of Mrs. Studdert is not duty paid in respect of the settled property. It is duty paid in respect of her personal property. Nothing in possession passed on her death; it was only an expectancy: *The Attorney-General* v. *Hay* (1) shows that the question of payment of prior duty does not arise, unless the payment is in respect of the whole property. We say, that looking at the whole Act, "settled property" means the whole property, and not a part thereof or an interest therein. *The Attorney-General* v. *Dodington* (2) does not touch this case, because it deals with the meaning of "disposition" in sect. 21. Sect. 5, sub-sect. (2), says—"If estate duty has been already paid." In sect. 1, "estate duty" is to be levied and paid "upon the principal value." Here there has been no payment on the principal value of the settled property. There has only been a payment on an interest in it. If the life interest in remainder had been that of a young man, the deduction would be very great and the hardship would disappear.

Cur. adv. vult.

June 21.

PALLES, C.B.:—

The sole question upon this appeal is whether the appellants are entitled to credit (as against the estate duty which otherwise would have been payable upon the death of the Rev. George Studdert, in respect of certain trust funds, comprised in his marriage settlement), for a sum of £97 1*s.* 4*d.*, which was paid by the executor of his wife, Mrs. Caroline Amelia Studdert, for estate duty upon her death in respect of the same trust funds. The Finance Act, 1894, 57 & 58 Vict. c. 30, by its 5th section, sub-sect. (2), enacts, that "if estate duty has already been paid in respect of any settled property since the date of the settlement, the estate duty shall not . . . be payable in respect *thereof* until the death of a person who was at the time of his death, or had been at any time during the continuance of the settlement, competent to dispose of such property."

Upon the death of Mrs. Caroline Amelia Studdert, which took

(1) 15 *Times* R. 290. (2) [1897] 1 Q. B. 722; [1897] 2 Q. B. 373.

Q. B. Div. 1899.

In re Finance Act, 1894, *and* Studdert.

Palles, C.B.

place on the 19th of March, 1897, the securities in respect of which estate duty was paid were, under the provisions of a settlement of the 7th October, 1861, held in trust, as to the income thereof, for the Rev. George Studdert for life, and after his death for Mrs. Caroline Amelia Studdert for life, and as to the capital thereof, after the death of the survivor (in the event, which happened, of there not being a child of the marriage who attained the age of twenty-one, or was married), for such person or persons as said Caroline Amelia Studdert, notwithstanding her coverture, should by deed or will appoint.

Caroline Amelia Studdert predeceased her husband. Upon that event, the life interest of the Rev. George Studdert in the settled funds did not pass; nor had Caroline Amelia an interest therein "ceasing on" her death. The reversionary interest, however, in the capital of the trust moneys, subject to the life interest of the Rev. George Studdert, being property of which Caroline Amelia was at the time of her death "competent to dispose," is by sect. 2 to be deemed to have passed; and, consequently, estate duty became payable upon the "principal value" of that reversionary interest, "ascertained as" in the Act after "provided." The words "ascertained as hereinafter provided," which are taken from sect. 1 of the Act, refer to, *inter alia*, sect. 7, sub-sect. (5), which enacts that the principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased. The Commissioners ascertained the total value of the trust moneys at £3564 3*s.* 4*d.* They then ascertained the value of the life interest therein of the Rev. George Studdert to amount to £413 17*s.*, and, having deducted the latter from the former sum, they ascertained the net value of the property which was deemed to have passed to be £3150 6*s.* 4*d.*, and upon this estate duty, amounting to £97 1*s.* 4*d.*, was paid.

It is to be remarked here, that as this interest of Caroline Amelia in the trust moneys was an interest in expectancy, her executors had the option, under sect. 7, of deferring the payment of the estate duty in respect of it until the death of the Rev. George Studdert, when the interest would have fallen into possession.

The Rev. George Studdert, the husband, died within a month after the death of his wife, on the 14th April, 1897; and upon his death a claim was made by the Commissioners of Inland Revenue for payment of estate duty for a second time upon the securities comprised in the settlement, making this distinction only between the sum secondly claimed and that which theretofore had been paid, that the second claim was for duty upon the full sum of £3564 3*s.* 4*d.*

Now, had the executors of Mrs. Studdert exercised the option I have referred to, the estate duty in respect of the death of Caroline Amelia would not have been payable until the death of George, but should then have been calculated upon the entire capital value of the trust property, as the expectancy would have fallen into possession; and if the Commissioners of Inland Revenue are right in insisting that a second duty, calculated upon that entire capital value, became payable upon the death of George, without any deduction in respect of the previous payment, then, plainly, double estate duty would be payable upon the trust moneys, by reason solely of their having passed from Caroline Amelia to, and having vested in possession in, the objects who became entitled through her disposition, or her intestacy—a result which, *primâ facie* at least, is contrary to the scheme of the Act.

This second duty, which amounted to £106 8*s.* 11*d.*, was also paid; and by this petition the appellants insist that the claim of the Commissioners of Inland Revenue should have been confined to estate duty on the value, at the time of Mrs. Studdert's death, of her husband George Studdert's life interest—viz., £413 17*s.*—and they seek repayment of the excess of the duty so paid.

Now I assume, for the purposes of my judgment, that had it not been for sect. 5, sub-sect. 2, the contention of the Inland Revenue would have been correct; and, therefore, the sole question which I propose to consider is whether the provisions of that sub-section are, in the events which have happened, applicable to the case before us. To render them so applicable two, but only two, matters must be shown: 1, that the £97 1*s.* 4*d.* paid upon the death of Mrs. Studdert was "paid in respect of settled property"; 2, that until after the death of the Rev. George Studdert there was not any person who was "at the time of his death, or had been at

Q. B. Div. 1899.

In re FINANCE T, 1894, *and* DERT.

Palles, C.B.

any time during the continuance of the settlement, competent to dispose of such property."

I shall consider the second question first. The only person suggested to be one "competent to dispose" was Mrs. Studdert; but plainly she cannot answer the description in the sub-section, because the first estate duty was paid upon her death, and the effect of the sub-section, although it does not contain the word "again," plainly is that, in the particular event mentioned in the first paragraph, estate duty shall not be payable *again*, until a certain other event shall happen. This second event, consequently, must be one subsequent to the time at which the first duty accrued. But the first duty accrued upon the death of Mrs. Studdert. Therefore, if the event contemplated in the commencement of the sub-section has taken place, second duty would not be payable until the death of a person who survived George Studdert, and "who was at the time of his death, or had been previously, competent to dispose of the property."

Thus the real contention is confined to the first point: Has the sum which was paid at the death of Mrs. Studdert "been paid in respect of any settled property"?

Sect. 1 divides all property into two categories, whichare together exhaustive, viz., "settled" and "not settled." By sect. 22, subsect. 1, the expression "settled property" means "property comprised in a settlement;" and "settlement" is, in its turn, defined (sect. 22 (1) (*i*)) as "any instrument, whether relating to real property or personal property, which is a settlement within the meaning of sect. 2 of the Settled Land Act, 1882, or if it related to real property would be a settlement within the meaning of that section." Turning now to that Settled Land Act (45 & 46 Vict. c. 38) "settlement" is by sect. 2 defined by cumbrous words, which, so far as they are applicable here, are, in substance, "an instrument under or by virtue of which an interest in land stands for the time being limited to, or in trust for, any persons by way of succession."

I confess myself unable to entertain a doubt that, at the death of Mrs. Studdert, the property in question was, and, after her death until the death of her husband, continued to be, "settled property" within the meaning of sect. 5, sub-sect. 2. It was "comprised in the settlement." Under it the property was held in trust for one

person for life, and upon his death for another or others in succession. It seems to me to be futile further to pursue this step of the argument.

If, then, the property, at the time the first duty accrued, answered the description of "settled property," the only remaining consideration is, was the duty which was paid upon Mrs. Studdert's death so paid in respect of that settled property? I find it difficult to see how this question can receive any answer other than an affirmative one. Indeed, the contrary seems to me to be incapable of argument. As, however, we are told that the question has not as yet been decided, and that this case is to be brought to an appellate Court for a binding decision upon this question, I must, in courtesy, assume that there is something which renders it worthy of consideration, and for this reason only I refer further to it.

The argument for the Inland Revenue is that as the duty paid on Mrs. Studdert's death was paid in respect of her reversionary interest in the settled property, it was paid in respect of something different from the "settled property" mentioned in the section, the latter expression being confined, as is insisted upon by the Commissioners, to the entire interest in such settled property; and it is said that, were any other construction given to these words, the amount which the Crown would be limited to recovering during the continuance of a settlement in a case in which the event upon which the first duty accrued was such that an interest of but small value in the property became subject to the duty would be less than that which would have been assessed upon the full capital value of the trust funds. It was, as I understand, in consequence of this argument that the appellants admitted liability to duty upon the death of George Studdert on the value of his life estate.

Now, I do not propose to stop to consider whether the estate duty paid on Mrs. Studdert's death was so paid in respect of a partial interest only in the settled property, within the meaning of this sub-section, or whether it was not so paid in respect of the then present value of the entire capital moneys which passed or were deemed to pass, but which moneys were not payable until the deferred time to which the payment of the duty might have

Q. B. Div. 1899.

In re FINANCE ACT, 1894, *and* STUDDERT.

Palles, C.B.

been deferred. Had the executors elected to defer payment until the death of Mr. Studdert, it would be difficult to argue that the deferred duty was not paid in respect of the entire *corpus* of the fund; and I do not myself see that the omission to exercise the option of the executors can vary the case. I am much struck by the reasoning of Rigby, L.J., in *The Attorney-General* v. *Dodington* (1)—reasoning from which his learned colleagues did not dissent, but which was not given effect to, because both he and they considered it not to be relevant to the case before them, in the absence of a cross appeal. I decline, however, to enter on the question here, because the petition expressly admits that estate duty became payable on this trust property on the death of George Studdert, and I must not be taken as expressing any opinion on it.

Assuming, then, that the payment of £97 1*s.* 4*d.* was made in respect of a partial interest in the settled property, I am still of opinion that that payment was in respect of the "settled property" within sect. 5, sub-sect. 2, because, on ordinary principles of construction, the whole must include a part, and because the taxing section (*i.e.*, sect. 1), by using the words "save as hereinafter expressly provided," renders it necessary to construe sect. 5, sub-sect. 2, as part of that taxing section; and if, on the true construction of both together, the case is not within the words of the enactment the omission cannot be supplied. In other words, if we read "settled property" so as to exclude a part of it, we, for the purpose of extending taxation, omit to give to that expression its full force—a construction which I hold to be impossible in a taxing enactment.

But over and above these reasons, which in themselves I should deem sufficient, I find in sect. 5, sub-sect. 2, and the enactments which must be read with it, quite sufficient to demonstrate its construction. By sect. 1 a uniform duty is payable upon all property, whether "settled" or "unsettled"; but it is payable in a wholly different manner in respect of each. When the property is not settled the estate in possession passes on the death of the deceased, and the duty is payable under sect. 1. There cannot in such a case

(1) [1897] 2 Q. B. 373.

be two events, upon each of which the Crown can advance a claim to duty, there cannot be a constructive passing within sect. 2, and there can be but one real passing within sect. 1. Therefore those claiming through the disposition or absence of disposition of the deceased cannot be subjected to a double duty. It is otherwise when the property is "settled." In such a case there can be, as in the present case there are, more events than one, upon each of which, but for sect. 5, sub-sect. 2, duty would become payable: one event, such as the death of Mrs. Studdert, on which the property either passed by an actual disposition, or is to be deemed to have passed; a second event, such as the death of George, on which duty would become payable, not because those who claimed through Mrs. Studdert took anything, but because George's life estate having ceased at his death, the provision of sect. 2, (1), (b) applied. But, in truth, the second event did nothing more than accelerate and bring into possession an estate which had previously passed, and in respect of the passing of which duty had already been once paid. In such a case the successor, but for sect. 5 (2), would have been liable to double duty:—1, on the death on the happening of which he acquired the reversionary interest; 2, on the death upon which that reversionary interest came into possession. But that which the successor would acquire by the operation of these two events would be no more than, had the predecessor been entitled to unsettled property, he would have acquired on the happening of the one event, the death of the owner. It is manifest, however, that the Legislature did not intend to impose estate duty twice over upon settled property during the continuance of the settlement, or any duty in addition to that which unsettled property should bear, save "Settlement Estate Duty," which we have not at present to consider; and if the object of sect. 5 (2) was, as I hold it to have been, to prevent this double duty becoming payable, it would not be adequate to its purpose if settled property did not include every part of it on which duty had been already paid.

As to the argument that, under the construction we adopt, if the first duty paid was in respect of an interest of but small value in the settled property, the Crown would be debarred from thereafter levying the difference between the duty so paid and the full duty on the capital value, the plain answer is that such result need

Q. B. Div. 1899.

In re FINANCE ACT, 1894, *and* STUDDERT.

Palles, C.B.

not necessarily ensue. Therefore the expression "in respect thereof" may well mean "the interest in the property in respect of which duty has already been paid," and even if such result should ensue, it would not, in my opinion, affect the conclusion. It would show no more than that the statute had used words which excluded a case for which possibly had Parliament been better advised it might have desired to provide.

I should have arrived at this conclusion, irrespectively of any authority; but the question decided in *The Attorney-General* v. *Dodington* (1), though not identical with that here, is closely analogous to it, and, so far, supports my view. It arose on the first sub-sect. of sect. 21 of the Act of 1894, which enacts that, except in a particular event, "estate duty shall not be payable on the death of a deceased person in respect of personal property settled by a will or disposition made by a person dying before the commencement of this Act, *in respect of* which property" probate duty "has been paid or is payable." The personal property in question there was held upon trust to pay the income to the wife for life, and after her death, if her husband should survive her, to him for life, and after the death of the survivor, upon trust for such person as the wife should by deed or will appoint. The wife died in the lifetime of her husband, before the commencement of the Finance Act, 1894, having by her will appointed the property in favour of certain beneficiaries, and probate duty was thereupon paid by her executors in respect of the value of the property so appointed after deducting the value of the husband's life interest. The husband died after the commencement of the Act. It was held that estate duty was not payable on the husband's death in respect of so much of the value as probate duty had been paid on. Whether it was payable upon the value of the husband's life interest was not decided, in consequence of there not being a cross appeal.

In my opinion the Commissioners should be ordered to repay the sum overpaid, and also to pay the costs of the petition.

GIBSON, J.:—

The only question raised in this case is the construction of

(1) [1897] 1 Q. B. 722; [1897] 2 Q. B. 373.

sect. 5, sub-sect. 2, of the Finance Act. If that provision does not confer exemption, it is conceded that estate duty was rightly charged. The sub-section must be read in the light of other provisions of the statute, particularly sect. 5, sub-sects. 1 and 3; sect. 7, sub-sect. 6; sect. 12; sect. 21, sub-sects. 1 and 3; and sect. 22, with its interpretation clauses. The problem seems to me one of difficulty, as the operation of many minds and hands can be discerned in the somewhat discordant enactments of the statute. It would be an interesting exercise of critical ingenuity, applying the methods of modern biblical exegesis, to exhibit in polychrome the original ground-work framed on ample lines by a Roman hand, and the various subsequent contributions of hostile emendation.

Before examining the crucial sub-section, I may call attention to some points which appear tolerably clear. It seems certain that estate duty is leviable (save where otherwise expressly provided) not merely on property in possession, but also on property in expectancy, such as remainders, whether vested or contingent. The express limited protection given by sect. 5, sub-sect. 3, and the detailed provisions for taxing interests in expectancy, are conclusive as to this. Again, it would seem plain that the general scheme of the Act is to charge estate duty on every occasion where property passes on death, unless there is a specific exemption. The extent of the protection given depends on the particular language employed. If the petitioners cannot bring themselves within the particular exemption they must fail.

With these preliminary remarks I turn to the consideration of sect. 5. Sub-sects. 1 and 3, which are on each side of sub-sect. 2, may throw some light on the latter sub-section; and I shall first say a few words on them, premising, however, that, as few of the enactments of the statute are free from elements of controversy or doubt, what I now throw out is expressed with extreme reserve, and is not to be regarded as a decision save on the particular point at present before the Court. Sub-sect. 1 creates, as a kind of additional estate duty, a duty styled settlement estate duty, which, leviable at the fixed rate of one per cent., is not payable more than once during the continuance of the settlement—whatever this last expression may mean (see *The Attorney-General* v. *Wood* (1)). The

(1) [1897] 2 Q. B. 102.

Q. B. Div. 1899.

In re FINANCE ACT, 1894, and STUDDERT.

Gibson, J.

sub-section is curiously phrased; but in the case of a settlement otherwise than by will, where settled property passes on death to some person *not competent* to dispose, settlement estate duty on the principal value of the property is (save as therein excepted) to be levied. The express reference to principal value here is accounted for by the duty being a new duty that might not come within the terms of sect. 1, which makes estate duty chargeable on the principal value of all property, settled or not, passing on death. The omission of any express mention of principal value in sub-sect. 2 may be (counsel suggest) explained by the same reason, that sub-section dealing with estate duty proper covered by the language of sect. 1. The principal value is ascertained (sect. 7, sub-sect. 5) as the estimated price which, in the opinion of the Commissioners, the property would fetch if sold in the open market at the time of the death. This provision would seem at first sight more appropriate to property in possession than to expectant interests, which are specifically defined by sect. 22, and the valuation of which, for the purpose of duty, is otherwise separately provided for. Under sect. 22 a person is deemed competent to dispose, if he has such an estate, interest, or general power as would, if he were *sui juris*, enable him to dispose of the property, including a tenant in tail, whether in possession or not (*Re Atkinson* (1)). This interpretation is in strong contrast with sect. 23 (applying to Scotland), which requires the tenant in tail to be in possession, and also with previous legislation, such as the Customs and Inland Revenue Act, 1889, c. 7, sect. 6, sub-sect. 5 (*a*). A tenant in tail, not in possession, can by his own act only acquire a base fee, save in the case where the owner of the only prior estate holds under a different settlement (*Berrington* v. *Scott* (2)). The places in the present Act, where a person competent to dispose is mentioned are sect. 2, sect. 5, sect. 18, and sect. 21. Settlement estate duty is only chargeable where the devolution is to a person not competent to dispose, in this respect differing from estate duty which is not subject apparently to any such restriction. Owing to this limitation, the former duty may often not be payable at all. The non-competency to dispose

(1) 30 Ch. D. 205. (2) 32 L. T. (N. S.) 125.

must be ascertained at the time the transmission takes place, and not on the death of the person not competent to dispose. If a tenant in tail in remainder is a person competent to dispose, whether he bars or does not bar the entail before his death is apparently immaterial under this sub-section, which seems to contemplate a devolution where the successor is not then competent to dispose.

This settlement estate duty is sometimes described as a sort of compensation or equivalent for the privilege conceded by sub-sect. 2. Whether this be so or not is a matter on which I offer no opinion. If settlement estate duty be regarded as such compensation or equivalent, sub-sect. 1 may influence the interpretation of sub-sect. 2.

Though sub-sect. 2 appears confined to what may be termed estate duty proper, sub-sect. 3 seems to comprehend settlement and estate duty alike: *The Attorney-General* v. *Wood* (1). The protection which sub-sect. 3 affords is limited by three conditions. The protected interest must be in expectancy, not in possession; it must fail or determine by reason of death, and subsequent limitations under the settlement must continue to subsist. An ultimate absolute estate and a tenancy in tail in possession are not, therefore, within the sub-section; and on the death of owners of such estates the property must be deemed to pass. It will be noticed that the sub-section deals with *interests* in settled property; and it implies that but for its provisions the determination of a particular estate in remainder (*The Attorney-General* v. *Robertson* (2)) by reason of death would have given rise to duty. Whether a tenant in tail in remainder who dies without having barred the entail, or the donee of a general power who dies without executing it, is a person whose interest fails or determines *by reason of death*, or whether the sub-section is limited to interests of which there was no competency to dispose, is a question not now before the Court. The sub-section does not repeat the expression used in the two previous sub-sections, "person competent to dispose," and text-writers, I believe, treat an unbarred tenancy in tail in remainder as within the sub-section.

I now turn to sub-sect. 2, the cardinal enactment on which

(1) [1897] 2 Q. B. at p. 110. (2) [1893] 1 Q. B. 293.

Q. B. Div. 1899.

In re FINANCE ACT, 1894, *and* STUDDERT.

Gibson, J.

the decision of this case depends. It defines two events between which the period of immunity enjoyed by the settled property extends. One event is the payment of duty in respect of any settled property since the date of the settlement; the other event is the death of a person who was at the time of his death, or *had been at any time* during the continuance of the settlement competent to dispose of such property. When this latter event happens, a fresh substantive duty is payable. If George Studdert had predeceased his wife, and duty had been then paid, would not duty have been again payable on Mrs. Studdert's death? On behalf of the Commissioners it is argued, that whether she died before or after her husband she was a person competent to dispose (under sect. 22); that the liability remained the same, the only difference being as to the *amount* of duty which, if she died first, would be ascertained in the manner prescribed in case of an expectant interest; and that what the section contemplates as the condition to immunity is full payment of duty at one time, which can only be where property in possession passes on death. The payment of duty on the death of a person competent to dispose in the case of an interest in expectancy, as well as of an interest in possession, is therefore the discharge of a substantive liability, and cannot affect the obligation to pay duty where the property passes under an earlier particular limitation. On this view, the order of the deaths is immaterial. The death of each person competent to dispose gives rise to a new independent duty. As against this construction, counsel for the petitioners urge that the settlement plainly continues; that any payment made during the continuance of the settlement in respect of any settled property, whether in possession or expectancy, is, so far as it goes, a good credit; that when once full estate duty on the principal value has been satisfied, no second duty accrues till the death of a person who was at the time of his death, or had been during the continuance of the settlement, competent to dispose of the settled property *in possession*. In other words (counsel argue), no second duty is chargeable until the settlement may be deemed to have come to an end.

The solution of the problem is by no means easy or certain, and counsel on both sides (not inexcusably) shifted their position more than once. Take a settlement on A for life, with remainder to B

in tail, remainder to C in fee. Suppose that A dies first, when full duty is paid, and that then C dies, pre-deceasing B. Counsel for the petitioners at first admitted that a second substantive duty was payable on C's death, in respect of C's expectant absolute estate. I mention this not to bind counsel by any admission, but to illustrate the difficulty of the problem. What if A, B, and C die one after another in consecutive order? On the demise of A, full duty is payable. On the death of B (to whom as tenant in tail in possession sub-sect. 3 cannot apply) is not a second duty payable on his death, as being a person who at the time of his death was, or had been, competent to dispose? and if the entail is not barred, is not a third duty payable on the death of C, as another such person? I did not understand this to be questioned.

It may be convenient to summarise some of the leading objections that may be plausibly advanced against the opposite instructions of sub-sect. 2 suggested on behalf of the petitioners and the Commissioners respectively. Those that may be urged against the petitioners' view are as follows:—

1. The interpretation clause (sect. 22) contemplates that a person having only an interest in expectancy may be a person competent to dispose. So far as such person is concerned (it may be said) the property may be treated as unsettled, and the existence of prior limitations affects the saleable or taxable value, but not the power of disposition. An absolute estate in expectancy, such as Mrs. Studdert's, is just as much property in the power of the owner as an estate in possession, though the value is less. To construe "person competent to dispose" as "competent to dispose *in possession* after the determination of all prior limitations," deprives the interpretation clause of much of its operation. Sect. 18 makes title in possession necessary; but there is no similar restriction in sects. 2, 5, or 21.

2. The use of the pluperfect tense, "*had been* at any time during the *continuance* of the settlement competent to dispose"—whether alienation or the determination of an estate tail is thereby contemplated—conveys that a person during the subsistence of preceding limitations under a settlement, may be competent to dispose. No doubt it may be said that this is not necessarily so if

Q. B. Div. 1899.

In re FINANCE ACT, 1894, and STUDDERT.

Gibson, J.

Wood's Case (1) is rightly decided, as a settlement was there held to continue so long as any estate created by it has not come to an end. On this view the settlement continues, though all particular estates have determined, and the ultimate absolute estate has been reached and fallen into possession. On the other hand, Lord Davey, in *Beech's Case* (2), distinctly states, that when beneficiaries become absolutely entitled to the property in possession, the settlement is at an end, and the trustees are *functi officio*. His remarks, however, were not addressed to section 5.

3. If the words "any settled property" comprise any expectant interest in settled property (sub-section 3 expressly mentions "interest"), the sub-section must be read in the same sense throughout, and the property which the person is spoken of as competent to dispose of must mean (in a case like the present) the expectant interest.

4. There may be several persons successively, under shifting limitations in a settlement, competent to dispose of expectant absolute interests; and upon each death during the subsistence of prior limitations, estate duty accrues: such duty may be computed on the then value of the expectant interest, or may be deferred, at the election of the person accountable, until the interest falls into possession, an event which may never happen where the interest is contingent or subject to a prior estate tail. In the event of the option of deferring payment being exercised, on the death afterwards of the tenant for life in possession during the suspense period, is duty payable on the property passing on his death, and at what rate, and what becomes of the duty previously assessed in respect of the expectancy?

5. The provisions as to aggregation are capricious, unjust, and unworkable if the rate of duty depends on the accident of who dies first. A remote remainderman in fee with only a nominal interest in the settled property may predecease the other beneficiaries, and may happen to have a large property outside the settlement. Is the rate of estate duty to be fixed by aggregation on his death in respect of the settled property? There is not the same obvious hardship if the aggregation takes place on the event of the first passing of the property in possession

(1) [1897] 2 Q. B. 102. (2) [1899] A. C. at p. 60.

(when duty is payable in full), and if the expectancy is regarded as the subject of a substantive independent duty. How is aggregation to be applied, and the rate of duty ascertained where the accounting party, on the expectant owner's death, elects to defer payment until possession, an event which may never occur? In case of such election, on the death of the tenant for life subsequently, is duty calculated by aggregation and paid on the latter's death? Is the duty previously ascertained on the expectant owner's death by aggregation to be regarded as displaced? Does the exercise of the option to defer affect the rate of and liability to duty in respect of the settled property? What is to happen where a tenant in tail in remainder creates a base fee? The accounting party on his death may elect to defer. The ultimate remainderman in fee may die next, and on his death, duty may be calculated and paid on his expectancy. The tenant for life in possession may die last. How in such a state of facts is aggregation to be put in operation?

6. Sub-sect. 1 expressly declares that settlement estate duty is only to be paid once during the continuance of the settlement. According to the petitioners, sub-section 2 means apparently very much the same thing. Not only however is the phraseology different, but the sub-section distinctly contemplates (in a particular event) the payment of a second duty. If this latter duty only arises when the settlement has come to an end, the turn of expression is not easy to account for.

The rival objections that may be suggested against the Commissioners' interpretation comprise the following:—

1. The beneficial operation of the sub-section is confined on their construction to particular interests under the settlement of which there is no competency to dispose.

2. If literally applied, the construction may deprive the taxpayer of protection where the person competent to dispose dies first, and before duty has been paid in respect of the settled property: and if a tenant in tail in remainder who has not barred his entail, or who has created a base fee, is deemed a person competent to dispose, it may exclude from benefit tenants for life claiming under subsequent limitations. This objection to the Commissioners' construction, if well-founded (I do not say whether

Q. B. Div. 1899.

In re FINANCE ACT, 1894, and STUDDERT.

Gibson, J.

it is or not), goes far to nullify the sub-section, at least in the case of an ordinary settlement of real estate; and makes the sub-section palter in a double sense, keeping the word of promise to the ear while it breaks it to the hope. To some extent, however, the difficulty, if it exists, may affect the petitioners' view as well. Take a common form of settlement on A for life, with remainders to B in tail, C for life, D in tail, and E in fee; and suppose the parties to die in that order. On the decease of A full duty is paid. B then succeeds, and, being in possession, does not come within sub-section 3. Is not a second duty payable on his death? C as tenant for life next comes into possession. On his death, does the payment made on the cesser of A's estate enure to protect from payment of a third duty?

3. The petitioners' main reliance was placed on *Dodington's Case* (1), and that authority relieves me from the necessity of pronouncing any final opinion on the conflicting arguments above suggested, some of which seem easier to state than to answer, and may be worthy of more consideration than they received in *Dodington's Case* (1), where the attention of the Court was chiefly directed to another question. The reasoning of that case appears to me decisive in favour of the petitioners. The 21st section, on which the case turned, by its final clause specifically excluded from the benefit of the section the case where the deceased at the time of his death or at any time since the will or disposition took effect had been competent to dispose of the property. The testatrix, Mrs. Popham, on whose expectant interest, when she predeceased her husband, probate duty had been paid, was in exactly the same position as Mrs. Studdert. The Court decided that the duty so paid must be credited *pro tanto* in satisfaction of estate duty, and that on her husband's death subsequently full estate duty was not chargeable. The decision involves that the wife during the continuance of the husband's life estate was not a person competent to dispose. The point could not have been overlooked, though it is not dealt with in the arguments and judgments. In deference to this authority, from which no appeal was taken, and which this Court must regard as at present settling the law, I feel bound to

(1) [1897] 1 Q. B. 736; [1897] 2 Q. B. 373.

decide in favour of the appeal. Should the implied and express reasoning in *Dodington's Case* (1) be overruled on appeal, I think that the petitioners who have relied upon that decision as accepted by the Commissioners would have a strong claim to be indemnified from costs.

MADDEN, J.:—

The decision of this case depends on the answer given to a single question: Was the payment of estate duty on the death of Mrs. Studdert a payment of estate duty in respect of settled property within the meaning of sect. 5, sub-sect. 2, of the Finance Act? If this question is answered in the negative, there is no statutory exemption from payment of the estate duty which becomes payable on the death of the tenant for life of the settled property, George Studdert. If it is answered in the affirmative, the consequence follows (in the words of the statute) that "estate duty shall not . . . be payable in respect thereof until the death of a person who was at the time of his death, or had been at any time during the continuance of the settlement, competent to dispose of such property." This event has not happened, and, whatever be the precise meaning and effect of the words which I have quoted, they are sufficient to exclude the claim for estate duty which has been put forward in this case.

Has, then, estate duty been already paid in respect of the settled property, within the meaning of this sub-section? The circumstances under which duty was paid on the death of Mrs. Studdert were as follows. Her husband was tenant for life in possession of the whole settled property, over which she had (in the events which happened) a general power of appointment by will or deed, subject to her husband's life interest. This power she had exercised by will. On her death estate duty was claimed, assessed, and paid by her executors. There can be no doubt that estate duty became payable upon this expectancy, inasmuch as it was one of which Mrs. Studdert was "competent to dispose." Whether this interest would have been captured by sect. 1, unaided by sect. 2 (1) (*b*), is an inquiry which was suggested in argument, but

(1) [1897] 1 Q. B. 722; [1897] 2 Q. B. 373.

Q. B. Div. 1899. *In re* Finance Act, 1894, *and* Studdert. Madden, J.

into which I do not think it necessary to enter, for the purposes of the present case. It is sufficient to say that duty became payable under the Act on this interest in expectancy, and that it was duly assessed under the 7th section, by deducting the value of the life interest of George Studdert from the total value of the settled property, and by calculating the duty on the remainder.

The Crown contends that the process which I have described was an assessment and payment of estate duty, not upon the settled property as a whole, but upon a certain limited interest in that property—the interest in expectancy vested in Mrs. Studdert at her death. According to this argument, estate duty cannot be said to be paid in respect of settled property, unless duty has been assessed on the entire principal value of that property, estimated as an interest in possession.

The expression "settled property" is defined by the interpretation clause as meaning property comprised in a settlement. Introducing this definition into the sub-section, it reads—"If estate duty has been paid in respect of any property comprised in a settlement since the date of the settlement." From such payment the consequence follows that estate duty is not to be payable in respect of the property "until the death of a person who was at the time of his death, or had been at any time during the continuance of the settlement, competent to dispose of such property."

The argument on behalf of the Crown, as I understand it, may be thus summarised. The person whose death is contemplated in the passage which I have just quoted, is a person competent to dispose of the whole interest in the settled property, either actually by virtue of the estate vested in him under the provisions of the settlement, or, conventionally, by virtue of the interpretation clause (sect. 22 (2) (*a*)). The words "such property" are referential. Having ascertained the meaning of "property" in the concluding portion of the sub-section, it is contended that it must bear the same meaning throughout, with the consequence that estate duty is not paid within the meaning of the sub-section unless it is paid on the whole interest on the property.

Now, there is much to be said for this reading of the sub-section, regarded simply from the point of view of the interpretation of a

single sentence of the English language. But it labours under two disadvantages. First, the sub-section, thus read, fails to afford protection against double duty in a state of circumstances which we must suppose to have been within the contemplation of the Legislature; and, secondly, the Court of Appeal in England, affirming the decision of the Queen's Bench, refused to apply this construction to a section substantially the same as that under consideration in the present case.

It appears to me that all the difficulties which stand in the way of the respondents in this case presented themselves in *The Attorney-General* v. *Dodington*. Once it had been decided in that case that the settlement and the testamentary appointment, taken together, constituted a "disposition" within the meaning of the 21st section, precisely the same question presented itself for decision as that which we have to determine. The sub-section in all essential points is the same. The exemption in the 21st section is from estate duty "in respect of personal property settled by a will or disposition." The words "in respect of which property" in the part of the section providing for the state of facts under which the exemption was to arise, are clearly referential; and the concluding portion of the sub-section, containing the words "competent to dispose," corresponds exactly with the language used in sect. 5, sub-sect. 2. The limitations in the "disposition" were the same as those in the settlement before us, and the state of facts in which duty was assessed is the same in both cases. Accordingly, probate duty was assessed on the death of Mrs. Popham in precisely the same manner as estate duty was assessed on the death of Mrs. Studdert. I may also observe that the two duties—probate and stamp duty—are on the same footing in this respect: they are both stamp duties, as distinguished from a differential duty, such as the former succession duty, which was levied in respect of particular interests in settled property. When a duty of the former class is spoken of as having been paid in respect of property, it would be natural to infer, in the absence of reasons to the contrary, that a payment in respect of the whole capital value of the property was intended.

The substantial identity of a case falling under sect. 5, sub-sect. 2, of the Act with the case before the Court in *The Attorney-*

Q. B. Div. 1899.

In re FINANCE ACT, 1894, and STUDDERT.

Madden, J.

General v. *Dodington* (1), is assumed in the argument of the Attorney-General on behalf of the Crown, and in the judgments of Vaughan Williams, J., in the Queen's Bench, and of Rigby, L.J., in the Court of Appeal. I find that sect. 5, sub-sect. 2, and sect. 21, sub-sect. 1, are dealt with together, and referred to as throwing light one upon the other. Thus, Vaughan Williams, J. refers to two classes of cases of possible hardship—"first, cases in which the hardship might arise by the imposition of the new duty taken by itself; and, secondly, cases in which it might arise in respect of persons who had paid duties under the existing law." He proceeds to point out that cases under the former category are dealt with by sect. 5, sub-sects. 1 and 2, and those under the latter by sect. 21, sub-sect. 1, the mode of dealing with both classes of cases being apparently the same. Rigby, L.J. concludes that the protection given by the latter section is as effectual as that afforded by the section under consideration, and that when probate duty has once been paid or become payable in respect of the interest of the settlor in settled property, "that should be as effectual for the purpose of exempting the property from payment of the estate duty, as under sect. 5, sub-sect. 2, the fact that estate duty has once been paid on settled property, is for the purpose of preventing a second duty from being payable." The same general principle of construction applies to both provisions. "I think we ought, if possible, to give to that section such an interpretation as will make it effective to guard against the hardships which, having regard to the whole scope of the Act, and to its particular provisions against hardship, it is plain the Legislature intended to be guarded against." (2) What the Court found it possible to do, for the purpose of guarding against hardship, in the case of one sub-section is equally possible to us in the case of the other. Our task, indeed, is an easier one; for, so far as I am concerned, it consists in applying an authority by which we are bound to the interpretation of a section which may indeed present difficulties—but the same difficulties as those which were dealt with in the case of *The Attorney-General* v. *Dodington* (1).

It would be a more difficult task to decide between the different

(1) [1897] 1 Q. B. 722; [1897] 2 Q. B. 373.

(2) *Per* Vaughan Williams, J. [1897], 1 Q. B. p. 735.

views of the construction of those sections which are suggested by the judgments in *The Attorney-General* v. *Dodington* (1), if we were called on to undertake it. Rigby, L.J. adopts the contention of the Crown, that the duty must be paid on the whole property in order to give rise to the exemption. But he holds that duty is paid on the whole settled property when it is assessed as in the present case. "That does not mean," he says, "that only part of the property or a partial interest under the settlement was charged: the probate duty was charged on the whole of the property subject to the settlement." If this be the correct view, it follows (as he points out) "that if the estate duty is not payable on the whole of the trust funds it is not payable on any part of them, the probate duty having already been paid on the whole."

This view of the section is different from that taken by Vaughan Williams, J., and Wright, J., in the Court of Queen's Bench, who appear to think that the exemption operates only in so far as duty has been already paid. They evidently consider that duty is to be regarded as paid in respect of property, when it is paid in respect of any interest in that property, and that the exemption is against a double charge in respect of that particular interest. This would be a reasonable provision, but it is difficult to spell it out of the language used by the Legislature. I confess, with the Lord Chief Baron, a leaning towards the view taken by Rigby, L.J. The difference between those views would be material if we had to consider the claim of the Crown to the duty paid on George Studdert's life estate. But either construction of the statute is equally conclusive against the claim with which the present case is conversant.

Solicitor for the appellants: *Rooke.*
Solicitor for the Inland Revenue: *R. O'B. Furlong.*

J. M^C^G.

(1) [1897] 1 Q. B. 722; [1897] 2 Q. B. 373.

Palles, C.B.
1900.
Feb. 3.

REG. *v.* CLARKE.

Criminal law — Felony — Misdemeanour — Personation at election — Local Government (Ireland) Act, 1898 — Election of county councillors — Statute — Incorporation.

The prisoner was indicted before Palles, C.B., at the Commission of Oyer and Terminer for Dublin city, held on the 3rd February, 1900, for that he did unlawfully personate and falsely assume to vote in the name of another person at an election for a county councillor for the borough of Dublin on the 15th January, 1900, the count concluding "against the statute and against the peace." In a second count he was indicted for an attempt to commit the said offence.

Held, that the first was a good count by statute, and, *semble*, would have been good at common law.

INDICTMENT.

The prisoner was indicted before Palles, C.B., at the Commission of Oyer and Terminer for Dublin City held on the 3rd February, 1900, for that he did unlawfully personate and falsely assume to vote in the name of another person at an election for a county councillor for the borough of Dublin on the 15th January, 1900,—the count concluding "against the statute, and against the peace."

In a second count he was indicted for an attempt to commit the offence.

E. A. Ennis, for the prisoner :—

The first count discloses no offence, either by statute or at common law; and, if so, the second count also fails.

By the Aldermen and Councillors of County Boroughs Election Order, 22nd December, 1898, clause 23 (1), the provisions of the Ballot Act, 1872, and only such provisions as are set out in the third schedule, are applied. When we turn to the schedule (2), we find, no doubt, a sub-heading, "Personation, Definition, and

(1) Vanston's L. G. Act, 1898, p. 214. (2) Vanston, 232.

Punishment of Personation"; and section 24 of the Ballot Act, 1872, is in part set out in the schedule. That section of the Ballot Act made personation a felony, but the portion of the section making it an offence is not set out in the schedule; and, therefore, construing the 23rd clause of the Order aright, that portion of the section of the Ballot Act making personation a crime is not applied; nor is the omission cured by the sub-heading.

It may be suggested that the second paragraph of the provisions as to personation (1) cures the defect, for it applies sections 93 to 96 of the Representation of the People (Ireland) Act, 1850. When we turn to that Act, however, we find that section 90 makes the offence of personation a misdemeanour, but section 90 is not applied. Therefore there is no offence by statute.

Nor is it an offence at common law. In *Reg.* v. *Bent* (2) it is expressly decided not to be an offence at common law. In *Whiteley* v. *Chappell* (3), if the enactment had been good at common law, the conviction would not have been quashed; similarly in *Reg.* v. *Sankey* (4).

Serjeant Dodd, and *J. H. Campbell, Q.C.*, for the Crown:—

The indictment is good. No doubt the sections are not applied where one might expect their application. But section 25 of the Election Order (5) applies the Municipal Elections Act of 1884, subject, however, to the provisions of this Order. By section 2 of that Act a person who commits any corrupt practice in reference to a municipal election shall be guilty of the like offence, and subject to the like incapacities, as if the corrupt practice had been committed in reference to a parliamentary election. [THE CHIEF BARON: Would not that bring in the provision of the Ballot Act, and make the offence a felony?] No; for it is expressly stated that only the provisions of the Ballot Act set out in the schedule shall apply, and the Municipal Elections Corrupt and Illegal Practices Act, 1884, is applied only subject to the provisions of the Order. But there is no express provision that section 90 of the Act of 1850 shall not be applied,

(1) Vanston, p. 232.
(2) 2 C. & K. 179; 1 Den. C. C. 157.
(3) L. R. 4 Q. B. 147.
(4) 3 Q. B. D. 379.
(5) Vanston, 215.

Palles, C.B. 1900. THE QUEEN v. CLARKE.

and it is applied, though not by special reference, by this second section of the Act of 1884. "Corrupt practice" includes "personation" by section 1 of the Act of 1884.

Even if section 90 were not applied, sections 93 to 96, which are applied, assume, and must be taken to enact, that personation is an offence. A person attempting it is to be arrested and returned for trial.

We do not admit that this is not a misdemeanour at common law. *Reg.* v. *Bent* (1) is not of much authority. Lord Mansfield's judgment that bribery is an offence at common law was not cited: *Reg.* v. *Pitt* (2). In the other cases the point was not raised by counsel for the Crown, and the attention of the Court was not called to it.

Ennis, in reply :—

If the argument for the Crown be good, the offence is a felony.

PALLES, C.B.:—

What would be the result, if the Legislature left two enactments on the statute book, one declaring the offence to be a misdemeanour, the other a felony, it is not necessary to decide. I am of opinion that section 2 of the Municipal Elections Corrupt and Illegal Practices Act, 1884, does make applicable the 90th section of the Act of 1850. Section 24 of the Ballot Act would or might also be applied, but for the provisions of the Order of the 22nd December, 1898, expressly excluding it.

I must not be taken as assenting to the proposition that fraudulent personation is not an offence at common law; and, if necessary, I should be prepared to decide that it is, and so I decline to follow the authority of *Reg.* v. *Bent* (1). The question, however, does not arise.

Ennis asked that the point might be reserved, but his Lordship declined to accede to the application.

Solicitor for the Crown: *Sir P. Coll.*
Solicitor for the prisoner: *J. P. Coffey.*

A. E. R. J.

(1) 2 C. & K. 179. (2) 3 Burr. 1335.

REG. (DROHAN) *v.* JUSTICES OF CO. WATERFORD (1).

Q. B. Div. 1899. Oct. 30, 31. Nov. 3.

Prohibition—Justices—Quarter Sessions—Appeal—Case stated by Justices— 20 & 21 *Vict. c.* 43, *ss.* 6, 14—*Finality of the decision of the Superior Court.*

D. was summoned before Justices, under the Fisheries Acts, for not making, and for not maintaining, a legal free gap in his weir at Lismore. The Justices, in January, 1899, convicted him for not making the free gap, and imposed a fine of £1000, their order being silent as to the second count—for not maintaining it. At D.'s request they stated a case for the opinion of this Division, setting out that, as they had convicted the defendant for not making the gap, they considered they could not also convict for not maintaining it, but that, if wrong in this, they were of opinion that the gap had not been legally maintained in certain particulars. The Court reversed the conviction for not making, but remitted the case to the Justices with an expression of their opinion that, by reason of a certain finding of fact in regard to the non-maintenance of the gap, the Justices ought to convict the defendant for not maintaining it, and should impose in respect thereof such penalty as was right. Thereupon, on the 29th July, the Justices at Petty Sessions made an order of conviction imposing on the defendant a penalty of £54. The defendant appealed from this order to Quarter Sessions. The prosecutor, on the 13th September, obtained a conditional order for a writ of prohibition, directed to the Chairman and Justices, who, when the Quarter Sessions subsequently met on the 20th September, adjourned the matter pending the decision of the Court whether prohibition should go.

On motion to make the order absolute:—

Held (Murphy, J., dissenting), that the "final and conclusive" effect of the decision of the High Court upon the case stated, and the "abandonment," by the acceptance of the case, of the alternative right of appeal to Quarter Sessions from the conviction of January, 1899, did not preclude the defendant from appealing to Quarter Sessions from the Justices' subsequent order of the 29th July.

Quære, Was the application for the writ of prohibition premature?

PROHIBITION.

Motion, on behalf of Thomas Drohan, to make absolute a conditional order (dated 13th September, 1899) for a writ of

(1) Before SIR PETER O'BRIEN, L.C.J., and MURPHY, GIBSON, and MADDEN, JJ.

Q. B. Div. 1899.

THE QUEEN v. JUSTICES OF WATERFORD.

prohibition directed to the Chairman and Justices of the Quarter Sessions of county Waterford, and to the appellants there, prohibiting them "from hearing, entertaining, or proceeding with" an appeal by the Duke of Devonshire, and Richard Foley and Edmond Foley (his lessees of the Lismore Salmon Weir), against an order of conviction by Justices at Lismore Petty Sessions, dated 29th July, 1899. The respondents, the Duke of Devonshire, and his lessees of the Lismore weir, had been prosecuted before three Justices of the Peace at Lismore Petty Sessions, on a summons charging them with (*a*) not making a legal free gap in that weir, and (*b*) not maintaining a legal free gap therein. The Justices, on the 28th January, 1899, convicted the defendants upon the first count, and imposed on them a fine of £1000, their order being silent as to the second charge. At the request of the defendants they stated a case for the opinion of the Queen's Bench Division (pursuant to 20 & 21 Vict. c. 43), in which they set out that they had adopted the view presented by defendants' counsel that, if the defendants were convicted for *not making*, they could not be convicted also for *not maintaining* the free gap, adding that, "should the Court be of opinion that we [the Justices] were wrong in so doing, then, in our opinion, a free gap has not been maintained in the following particulars . . ." The questions submitted by the case were—"1, whether, on the facts as found by us as aforesaid, we were entitled to convict the defendants for not making a legal free gap as aforesaid; and, 2, whether upon the facts found by us, and having regard to the aforesaid conviction for not making a free gap, we were debarred from convicting the defendants for not maintaining the same, or as to what should be done in the premises."

The Court, after argument, held, by order dated 19th June, 1899, that the conviction for not making a free gap was wrong, and should be reversed, and remitted the case to the Justices "with the opinion of the Court that by reason of their finding in respect of the matter stated in the second particular of the second complaint in the summons, viz. 'that the sides of the gap were not on a line with, and parallel to, the direction of the stream at the weir,' they ought to convict the defendants upon the second complaint, and should impose, in respect thereof, such penalties upon

the defendants as to the Justices shall seem right, according to law."

See the report of these proceedings [1900] 2 I. R. 161, where the facts are more fully stated.

On the 29th July, 1899, in compliance with this order, the Justices, sitting at Lismore Petty Sessions, entered up a conviction against the defendants, imposing a penalty of £54. Only two of the three Justices, by whom the case had been originally heard, sat on this occasion—the third having been in the interval appointed to the shrievalty of the county, and being therefore disqualified.

The defendants served notice of appeal from this conviction of the 29th July, to the next Court of Quarter Sessions for the county; entered into the necessary recognizances; and served the usual notice of "intention to prosecute" the appeal before the Court of Quarter Sessions to be held at Lismore on the 20th September, 1899.

The conditional order for a writ of prohibition was granted, on the applicant's affidavit, on the 13th September.

It was stated that, when the Chairman and Justices assembled at Quarter Sessions on the 20th September, the appeal was formally "adjourned" pending the decision of the Queen's Bench Division in regard to the prohibition.

Healy, Q.C. (*T. Sullivan* with him), for the applicant (Drohan), now moved to make the conditional order absolute:—

The decision of this Court on the case stated was, under 20 & 21 Vict. c. 43, ss. 6, 14, "final and conclusive" on the parties; and, by electing to take an appeal by way of case stated, the respondents (the Duke and his lessees) "abandoned" their alternative right of appeal to Quarter Sessions. In requiring a case to be stated by Justices for the opinion of the High Court on a question of *law*, a party must be taken to have accepted the *facts*, as proved at the hearing at Petty Sessions, and the findings thereon of the Justices, as fair and complete, and as a basis fair and complete for the decision of the High Court upon the questions of law involved. If the case as stated does not set out the circumstances fairly or

Q. B. Div. 1899.

THE QUEEN v. JUSTICES OF WATERFORD.

completely, either party may apply to the Court (*Uncles* v. *Attorney-General* (1)), or the Court, of its own motion, may remit the case to the Justices for amendment: 20 & 21 Vict. c. 43, s. 7. It is not open to a party to take his chance on the evidence presented at Petty Sessions, and on the facts as set out in the case stated, and, when he fails upon the argument of that case in the High Court, to appeal to Quarter Sessions in the hope of adducing new or contradictory evidence, or of finding a more favourable tribunal.

As to the objection that the application for the writ was premature, see *Mayor of London* v. *Cox* (2); *Sewell* v. *Jones* (3). The respondents had taken all the preliminary steps, and the appeal not merely had been "entered" on the books of the Quarter Sessions Court for hearing, but had actually been called on for hearing and "adjourned" pending the decision of this Court on the present motion. The Court of Quarter Sessions therefore treated the appeal as one of which they had seizin. The modern form (4) of the writ of prohibition both in England and Ireland is, "whereas you have *entered* an appeal, &c." See Crown Office Rules (Forms) (5).

D. B. Sullivan, Q.C., and *Sandford*, for the appellants to Quarter Sessions:—

The application for the writ on the 13th September was premature. The Court of Quarter Sessions (which only met on the 20th September), had not then taken any step whatever, or in any way transgressed their jurisdiction. Nor have they now. The entry of the name of the case in the books is not an act of that Court, and the order of adjournment was merely an order staying matters (including any preliminary discussion as to jurisdiction) until the present motion was disposed of, so that the inferior tribunal might be in a better position to decide whether it had jurisdiction to entertain the appeal. It should not be assumed

(1) Ir. R. 7 C. L. 462.

(2) L. R. 2 H. L. 255.

(3) 1 L. M. & P. 525.

(4) The ancient form seems to have been "tenuisti (tenuistis) placitum" ("doth (do) hold plea"): see Rensta1's Entries, *sub tit.* "Prohibition"; see also *Mayor of London* v. *Cox*. (L. R. 2 H. L. p. 280).

(5) Short & Mellor (Ed. 1890), p. 604.

that any Court will usurp a jurisdiction it does not possess, and no case can be cited in which prohibition was granted before the inferior Court had taken some positive step. In the old cases of prohibition to the Ecclesiastical Courts, a summons had issued from the Court itself: Comyn's Digest, "*Prohibition.*" In *Sewell* v. *Jones* (1) a summons had been issued out of the County Court in regard to a matter plainly in excess of jurisdiction. In other cases prohibition has issued because a plea (or objection) to the jurisdiction had been improperly rejected: *e.g. Thompson* v. *Ingham* (2). Here it is admitted that the inferior court has never as yet assumed jurisdiction to deal with the case. The applicant's proper course would have been to have objected before the Court of Quarter Sessions that there was no jurisdiction to entertain the appeal: see *Trustees of E. Jones* v. *Gittins* (3); *Skipton Industrial Society* v. *Prince* (4).

It is unnecessary, however, to enlarge upon this point, for, as we submit, there is, upon the main question, a complete answer to the application for a writ of prohibition. There was no decision by the Justices on the 28th January, 1899, or determination by them, in regard to the second charge, from which an appeal could have been taken by the defendants to Quarter Sessions. Until the case was stated it was naturally assumed that the Justices had *dismissed* the second charge: see *Stevenson* v. *O'Neill* (5). The order of conviction from which the appeal to Quarter Sessions was taken was that of the 29th July, 1899. This order (or determination) of the Justices had no existence *in rerum natura* when the case was stated, and the appellants' only mode of questioning this later order was by appeal. The provisions, therefore, of sections 6 and 14 of the Act 20 & 21 Vict. c. 43, have no application here. We submit that the Justices at Quarter Sessions have full jurisdiction to hear *all* evidence adduced before them both as to the maintenance as legal of the free gap, and as to the amount of the penalty if they decide that the conviction should be affirmed. However, even assuming that the directions of this Court, based on the findings of the Petty Sessions, are absolutely binding on

(1) 1 L. M. & P. 525.
(2) 14 Q. B. 710.
(3) 51 L. T. (N. S.) 598.
(4) 33 L. J. (N. S.) M. C. 323.
(5) Ir. R. 11 C. L. 134.

Q. B. Div. 1899.

THE QUEEN v. JUSTICES OF WATERFORD.

the Quarter Sessions Court, they at least have jurisdiction to consider all evidence offered before them for the purpose of judicially determining whether the penalty imposed at petty sessions should be diminished or not, the amount being a matter in their discretion. If they possess jurisdiction even as to a part only of the subject-matter of the appeal, prohibition will not issue: *Reg.* v. *Twiss* (1); *Hallack's Case* (2); *Skipton* v. *Prince* (3). [In regard to the form of the order of the 19th July, 1899, counsel, in reply to Gibson, J., who referred to *Shackell* v. *West* (4), stated that they did not suggest that the order was *ultra vires*.]

T. Sullivan, in reply.

[Counsel also referred to *Reg.* v. *Sullivan* (5); *Reg.* v. *Russell* (6); *Reg.* v. *Brosnan* (7).].

Cur. adv. vult.

Nov. 3.

SIR P. O'BRIEN, L.C.J.:—

This case presents a novel point under the Act 20 & 21 Vict. c. 43, which governs the procedure in cases stated by Justices at Petty Sessions.

It appears that Mr. Drohan, as Inspector of the Lismore Fishery District, issued a summons against the Duke of Devonshire and Mr. Foley, charging that, though owners of the Lismore Weir, they did not make a legal free gap in the said weir, and, as a further offence, in the same summons, that the defendants did not maintain the free gap in said weir in accordance with the provisions of the Salmon Fisheries (Ireland) Act, 1863. When the summons came on to be heard, the magistrates convicted the defendants on the first charge in the summons, and recorded no determination on the second charge. An appeal by way of case stated, under 20 & 21 Vict. c. 43, was taken by the defendants; and this Court held that the magistrates were wrong in convicting on the first charge in the summons, for not making a free gap

(1) L. R. 4 Q. B. p. 407.
(2) 1 Q. B. 593; 1 G. & D. 100.
(3) 33 L. J. (M.C.) 323.
(4) 2 E. & E. 326.
(5) 22 L. R. Ir. 98.
(6) Cases under the Criminal Law (Ireland) Act, 1887, p. 114.
(7 *Ibid.* p. 53.

according to the statutory provisions, on the ground that the certificate given in 1866 by the Commissioners of Fisheries, declaring the free gap to be in accordance with the provisions of the Act of Parliament, was in effect a judgment *in rem*, and conclusive, and that, therefore, the defendants should have been acquitted on the first charge. As to the offence charged secondly, namely, for not maintaining the gap pursuant to the statutable requirements, this Court was of opinion that, upon a certain finding of fact in the case, the magistrates should have convicted, and directed them so to do. This Court, accordingly, by its order, directed them to convict, and to impose such penalty as they should think fit. The statute did not require the imposition of a certain fixed sum for penalties, but enacted that the penalties should not exceed a certain amount, so that, up to the maximum, the Justices had a discretion. The case went back to the magistrates, and, following the direction of this Court, they convicted on the finding in the case, and judicially determined the amount of the penalty.

The defendants proceeded to appeal to Quarter Sessions against the conviction; they served notice of appeal; and a writ of prohibition is now sought to prevent the Court of Quarter Sessions from entertaining the appeal.

The legal aspects of the position were clearly presented by Mr. Healy. He says that the Court of Quarter Sessions has no jurisdiction whatsoever to entertain the question; that, to allow an appeal, would be to infringe the provisions of the Case Stated Act, which provides that every order made by this Court on a case stated shall be final and conclusive on the parties; that in fact there has been an appeal to the Queen's Bench Division by the defendants, and that this precludes the possibility of any other appeal.

Mr. Sullivan quite admits that the Act of Parliament enacts that all orders made by this Court are final and conclusive; but he asks these two questions—What was the order of this Court? and what was the date of the conviction by the magistrates? The order was to convict upon the magistrates' findings of fact for not maintaining a free gap, and to impose a penalty discretionary as to amount; and the date of the conviction, which imposed a judicially determined amount, was subsequent to that order. Mr.

Q. B. Div. 1899.

THE QUEEN v. JUSTICES OF WATERFORD.

Sir P. O'Brien, L.C.J.

Sullivan argues that, as the conviction was subsequent to that order, the "case stated," upon which that order was made, could not be regarded as an appeal from what was subsequent to it,—that no such conviction was in existence at the time of the order, and that therefore the case stated could not be treated as an appeal from a thing which did not exist, the very word "appeal" implying the existence of an order or conviction from which the appeal is taken. Mr. Sullivan further argues that, having regard to the amount which his clients were fined, they have a statutable right of appeal under the 14 & 15 Vict. c. 93; that this right has not been taken away by anything that has occurred. I agree with him in both branches of his argument.

In my opinion, though the conviction was made pursuant to the direction of this Court, it was nevertheless a conviction by the magistrates, and, no appeal having been hitherto taken from it, it is now appealable. The order of this Court, directing the magistrates to convict, was final and conclusive, but the conviction itself is a different thing from the order to convict, and is not final and conclusive.

It is to be especially noted that, though this Court expressed a certain opinion upon the findings of fact in the special case (I emphasise the words "findings of fact," as I desire to distinguish these findings from statements of evidence merely), though it gave, as I have said, a direction to convict upon the findings of fact, it left the amount of the penalty, the determination of which was clearly a judicial matter, to the discretion of the magistrates. The amount of the penalty was not dealt with at all by the Court; its ascertainment was an entirely new judicial determination; and it is well settled that, if a Court has jurisdiction to entertain a case in any part of it, prohibition will not lie. However, I think that the whole case, upon the conviction had, is appealable—that is to say, it is competent for the Court of Quarter Sessions to review the finding of fact upon which the conviction was directed, and to review also the amount of the penalty.

It is, in my opinion, open to them to "confirm, vary, or reverse." They should in this case, of course, convict—and as to this I am very clear—if they are of opinion that the findings of fact already arrived at in the Court below were right. The case

would then be one for conviction according to the opinion lately pronounced in this Court. Upon this there can be no doubt.

Several other questions were presented during the argument for our consideration. With these it is not necessary for me to deal, having regard to the view I take of the case. I should wish, however, to add just one word in regard to *Shackell* v. *West* (1). The headnote of that case as reported in Ellis & Ellis is as follows:—

"Goods pledged with a pawnbroker were lost through a burglary on his premises, caused by his negligence. The owner laid a complaint before Justices under the statute 40 Geo. 3, c. 99, s. 14, against the pawnbroker for refusing, without reasonable cause, to deliver up the goods upon tender of the proper amount. The Justices made an order that the pawnbroker, not having shown reasonable cause to their satisfaction to the contrary, should deliver up the goods, or, in default, compensate the owner: *Held*, on a case stated, that the order was bad, section 14, under which the order was made in effect, applying only to cases of wilful refusal by a pawnbroker to deliver up goods actually in his possession; and that the Justices should have made an order under section 24, which empowers them to award compensation to the owner, if in the course of any proceedings under the Act, they shall find that the goods were lost 'through the default, neglect, or wilful misbehaviour' of the pawnbroker. *Semble*, that this Court had power to amend the order to one in accordance with section 24 under the statute 20 & 21 Vict. c. 43, s. 6. But as in such case the appellant would have lost his right of appealing to the Quarter Sessions, under the statute 40 Geo. 3, c. 99, s. 35, the Court remitted the case to the Justices."

Under the English Summary Jurisdiction Code it was possible to include only one charge in the summons; and still the Court of Queen's Bench, while holding that the order of the Justices could not be sustained as it stood, gave expression to their opinion that an order, substantially identical, could have been properly made in another way—that is to say that the findings of fact

(1) 2 E. & E. 326.

Q. B. Div. 1899.

THE QUEEN v. JUSTICES OF WATERFORD.

Sir P. O'Brien, L.C.J.

would have justified a conviction under another section of the statute. Apparently they held that they (the Queen's Bench) might have themselves varied the order; but, considering it more convenient not to do so, they remitted the case to the Justices to deal with it in accordance with their opinion, as, had they dealt with the matter themselves, the defendant might have been precluded from appealing.

According to that decision, if it be well-founded—and I here assume that it is well-founded—the Court might itself have pronounced a new order against the defendant, but, as this course would, in their opinion, have deprived the defendant of his right of appeal to the Quarter Sessions, they considered that the proper course was to remit the case to the Justices, to be reheard by them with reference to the view of the Act taken by the Court, so that the order when made at Petty Sessions in accordance with that view, would be not an order of the Queen's Bench but an order of the magistrates, and therefore appealable. That case, therefore, as far as it goes seems to bear out the conclusion at which the majority of this Court have arrived. I regret that my brother Murphy feels himself unable to concur in that conclusion.

MURPHY, J.:—

I am unfortunate in not being able to agree in the view taken by the other members of the Court.

In this case an application is made to the Court on behalf of the complainant that a writ of prohibition should issue to prevent an appeal from a conviction at Petty Sessions being heard at Quarter Sessions in the county of Waterford.

The Lord Chief Justice has stated in full detail how the question comes before the Court for decision.

The case stated by the Justices, at the desire of the defendants, set forth their findings, and the conclusions they had arrived at on the evidence that they had before them; a note of the evidence given before the Justices was by consent of the parties incorporated with the case stated, and "to be deemed part of it"; and the judgment of this Court was required as to whether, first, "on the facts as found by us as aforesaid we were entitled to convict the defendants for not making a legal free gap as aforesaid; and,

secondly, whether upon the facts found by us, and having regard to the aforesaid conviction for not making a free gap, we were debarred from convicting the defendants for not maintaining the same, or as to what should be done in the premises."

After argument lasting over three days the Court made an order "that the conviction on the first complaint in the summons be and the same is hereby reversed, and that the case be and the same is hereby remitted to the Justices with the opinion of the Court that, by reason of their finding in respect of the matter stated in the second particular of the second complaint in the summons, viz. 'that the sides of the gap were not on a line with and parallel to the direction of the stream at the weir,' they ought to convict the defendants upon the said second complaint, and should impose in respect thereof such penalties upon the defendants as to the Justices shall seem right according to law."

Accordingly, the case came again before the Justices at Petty Sessions that they might do what they were directed by the order of the Court. They made an order such as they considered the Court had directed them to make by the order setting forth what should be done in the premises.

No question is raised by counsel for the defendants as to the order made by the Justices not complying with the order of this Court, and it is not suggested in the affidavit filed on defendants' behalf that the penalty imposed was at all excessive. Indeed, as to this part of the conviction, no attention was paid to it in argument, either by counsel or the Court. The question was, was the conviction right; and this was the only question which concerns the defendants, and the only one they were anxious to get rid of.

The defendants are now proceeding to have the order of this Court and the conviction had in pursuance of that order, reviewed by the Court of Quarter Sessions, and made null and void. In my opinion, the Court of Quarter Sessions has no power to enter on any inquiry that will necessarily imply that it has the power to reverse and nullify an order made by this Court on a case stated under the 20 & 21 Vict. c. 43. I am of opinion that, by force of sections 6 and 14 of that Statute, the order of this Court is (in the words of the 6th section) "final and conclusive on all parties," and that the defendants who "appealed" under the provisions of

Q. B. Div. 1899.

THE QUEEN v. JUSTICES OF WATERFORD.

Murphy, J.

that statute have abandoned the right of appeal they had to Quarter Sessions. I believe it is the first time that an attempt has been made to have an appeal heard at Quarter Sessions from a decision arrived at in this Court on a case stated. If an appeal is heard at Quarter Sessions, it is obvious that power will be vested in the Court of Quarter Sessions to declare null and void the order made by this Court on the case stated, after deliberation, and after four days' argument.

GIBSON, J. :—

This application for a prohibition is based on the ground that the right of appeal to Quarter Sessions has been lost or abandoned by reason of the Duke of Devonshire and his co-defendants having appealed from the determination of the Justices by case stated. The motion is resisted on several grounds, most of which, upon the view that I take, I find it unnecessary to discuss. The circumstances are rather unusual. The original summons charged two different species of offences; one for not making, the other for not maintaining, a proper gap. The Justices convicted of the former offence; and, holding that such determination exhausted the case, declined to dismiss or make any order upon the second charge. The defendants applied for a case stated in reference to the determination. The case when stated, it was found, brought before the Court the second charge on which the defendants had not been convicted, and from which therefore they had no right of appeal. No objection, however, was taken to the form of the case; and, after argument, the Court decided that the determination below, from which the defendants below could have appealed, was erroneous, but that upon the second charge (as to which no order or determination had been made or entered), the defendants should have been convicted. They sent back the case accordingly to the Justices with a direction to convict and assess the proper fine. This the Justices did, but it appears that one of them who had assisted at the original hearing was unable, having become sheriff in the meantime, to join in the ultimate order.

I have no doubt that, where a case is stated in such a shape as to enable the Court to make a complete and final adjudication, and where the Court makes such adjudication, the party who

obtains the case loses his right of appeal, if any. The present case, however, is peculiar. At the time the case was stated the defendants had no right of appeal in respect of the second charge, and at the time the Court pronounced its decision the materials for drawing up a valid conviction did not exist, as there was no fine, and the Court had no jurisdiction to measure or impose a fine. To assess the fine, the Justices had to consider the case judicially, and exercise their discretion as to amount; and there was and could be no legal order until their determination as to the fine was declared. This decision was subsequent to the judgment of the Court.

The defendants have a statutory right of appeal from this last order, unless the Case Stated Act takes it away. Two sections are relied upon as precluding any such appeal. The first of these is the 6th section. Under it, the Court is to determine the question or questions of law arising on the case, and to reverse, affirm, or amend, the determination below, or remit the matter to the Justices with the opinion of the Court, or make such other order as to the Court seems fit. There is thus a choice of three courses. If the facts are stated sufficiently to enable a final order to be made, the Court may deal with the matter itself directly, or it may remit the matter to the Court below with its opinion, or it may make some other order, as, for example, where the case does not enable the Court to pronounce any decision or opinion, and further facts must be supplied by the Justices. The conclusive effect given by section 6 to orders of the Court can only apply where the Court has given a decision or opinion. Where a complete and final determination is arrived at, there can be no appeal as to the law; and I think, looking at section 14, there can be no appeal as to the facts or evidence. The case stated and adjudication are in lieu of an appeal. Where, however, there is no final and complete determination upon the case stated, and a substantial judicial duty has to be discharged by the Justices after the order of the Court, at first blush it would seem that the previous decision of the Court, upon the particular questions of law then before it, ought not to affect the right of appeal upon errors of fact or law in respect of the ultimate decision of the Justices at a later period.

Q. B. Div. 1899.

THE QUEEN v. JUSTICES OF WATERFORD.

Gibson, J.

The provision, however, mainly relied upon was sect. 14, which was obviously intended to add something to sect. 6. An appeal by any person by case stated against any determination of a Justice or Justices from which such person is by law entitled to appeal to Quarter Sessions, is to be taken as an abandonment of such last-mentioned right of appeal, finally and conclusively to all intents and purposes. The appeal by case stated can only be upon questions of law; the appeal to Quarter Sessions may be on facts or law. The necessary effect of the section, *where it applies*, is to deprive a person who appeals under the Act of his pre-existing right of appeal to Quarter Sessions. However wide an interpretation be given to the section, it is manifest than an appeal by case stated does not always and universally forfeit the right of appeal to Quarter Sessions. Justices having heard a complaint may dismiss it on the ground that the complainant is not entitled to sue: see *Stevenson* v. *O'Neill* (1); and the Court above, while overruling that determination, may find it necessary from the frame of the case to remit the matter to the Justices to be dealt with on the merits. There would be plainly in such a case an appeal from the final order made by the Justices. Take another illustration: Magistrates dismiss a case for want of jurisdiction, but find all the facts necessary for a complete determination of the case, save one fact—say, the amount of a penalty which is in their discretion. The Court, holding that there was jurisdiction and that the Justices ought to have convicted, remit the case with that expression of opinion. Would there not be an appeal from the ultimate determination of the magistrates? *Muir* v. *Hore* (2) throws some light on the answer. The Court there ruled that the magistrates were wrong in deciding that there was no jurisdiction, and held that the facts as stated, unless they could be altered (that is, I suppose, altered by evidence) constituted an offence. The case was remitted to the Justices accordingly. If this case is correctly reported, it would seem as if the Justices were at liberty to hear evidence and reconsider the facts. From their decision under such circumstances it would be hard that no appeal should lie. *Shackell* v. *West* (3) also bears on the point.

(1) Ir. R. 11 C. L. 134. (2) 47 L. J. (M. C.) 19. (3) 2 E. & E. 326.

There the Justices convicted the defendant of an offence under a section of a statute which did not apply, but the facts set out in the case disclosed a complete offence under another section. I would collect that the Court had sufficient materials, the value of the goods having been ascertained, to make a final determination if it saw fit to amend. The Court, however, though thinking there was jurisdiction, declined to amend, lest they should deprive the defendant of his right of appeal. The case was, accordingly, remitted, the Court deciding that the determination below was wrong. These authorities show that a litigant who applies for and obtains a case stated, does not, from that circumstance standing alone, forfeit his right of appeal. Such litigant is bound by the decision or opinion of the Court as to the points of law; and he cannot further appeal where upon the facts the Court is in a position to make, and makes, a complete determination. But when the Court cannot do so, and is compelled to send the case back to the Justices to supply something necessary (as here) and then makes an order accordingly, does section 14 apply? Three views are possible. 1, There was no appealable determination until the Justices made their final order imposing the fine; and from that order there is a plenary appeal to the Court of Quarter Sessions, which is at liberty to hear evidence and adopt a different view of the facts from that taken by the Justices, but is bound by the opinion of this Court as to questions of law decided by it—perhaps not necessarily as matter of jurisdiction, though I do not decide this—but in the same way that this Court is bound to obey a decision of the Court of Appeal. 2, There is an appeal to Quarter Sessions, but that Court is bound by the facts stated in the special case, as well as by the law pronounced by the Court upon those facts, the jurisdiction of the Court of Quarter Sessions being limited to the part of the order consisting of new matter, here the amount of the fine which might have been a very large sum. 3, No appeal at all is competent, as the facts and law are conclusively and finally established by the case stated and decision thereon, and a partial appeal from portion of an order is unheard of and impossible. Under the Petty Sessions Act the entire order appealed from is brought up for review. I incline to the first view.

Q. B. Div. 1899. THE QUEEN v. JUSTICES OF WATERFORD. Gibson, J.

The statutory right of appeal can only be divested by clear words. In the present case there was no adverse determination on the second charge from which an appeal could have been taken at the time the case was stated; and there was no legal or appealable order till the Justices imposed the fine. The Act of 20 & 21 Vict. c. 43, does not, therefore, apply. If the Court of Quarter Sessions has jurisdiction to entertain the entire appeal, prohibition is impossible. If, however, there is only partial jurisdiction, prohibition is equally—at this stage at least—inadmissible, as the Court of Quarter Sessions has not, as yet, exceeded its jurisdiction: *Mayor of London* v. *Cox* (1), *Devonshire* v. *Foot* (2), explained by the Lord Chief Baron in his judgment in this case (3). Having read the shorthand notes of the Queen's Bench judgments in this case (3), I greatly doubt that the Court would have taken the course it did in convicting the defendants on their own appeal, on a charge not legally determined against them below, if it was not supposed that the right of appeal was unaffected: see *Shackell* v. *West* (4).

MADDEN, J.:—

The proceeding which we are asked to stop by a writ of prohibition is an appeal to Quarter Sessions against an order of Justices imposing a fine exceeding twenty shillings. The appeal clearly lies, unless something has occurred to prevent the appellant from exercising the right expressly conferred on him by the 24th section of the Petty Sessions Act.

It is said that the order in question is final and conclusive, inasmuch as it has been made by the Justices in obedience to an order of this Court, made upon a case stated at the instance of the present appellant, who by taking this proceeding has (it is contended) abandoned his right to an appeal under the Petty Sessions Act. But, when the appellant applied to have a case stated, the order from which he now appeals had no existence. The Justices had fined him for the offence of making an illegal weir. He applied to have a case stated, and by so doing abandoned his

(1) L. R. 2 H. L. 239.
(2) Now reported *supra*, p. 211.
(3) *Supra*, p. 161.
(4) 2 E. & E. 326.

right of appeal from the Justices' order to Quarter Sessions. The case submitted for the decision of this Court two questions of law, one as to the validity of the adjudication actually made by the magistrates, and the other as to an adjudication which they had not made. This Court, acting under the sixth section of the statute (20 & 21 Vict. c. 43) determined both these questions of law. It (in the words of the section) reversed the determination in respect of which the case had been stated, and remitted the matter to the Justices, making at the same time an order, based upon the actual finding of the Justices, and also upon the determination by this Court of the second of the two questions of law. Under this order the Justices were bound to convict, and did convict, the present appellant of the offence of maintaining an illegal weir, and fixed the amount of the fine.

It is contended on the part of the applicant for the writ of prohibition that the present appellant by applying for a case stated rendered himself liable to the statutory consequences of his act; that the order of this Court is final and conclusive under the sixth section; and that his right of appeal to Quarter Sessions must be taken as abandoned under the fourteenth section of the statute. On the other hand, it is urged that the case was taken only in respect of the determination actually made by the Justices, and that the stating of the case did not amount to an appeal upon the portion of the summons upon which they had not adjudicated. Without discussing the question thus suggested, I will assume that the appellant is bound by the statement of the case (to the form of which he took no objection), and that under the sixth section of the Act he is concluded by the determination by this Court of both the questions of law submitted to it, and is bound by the order made as the result of this determination.

But what has this Court determined, and what is its order? It has determined as a matter of law that a conviction for maintaining an illegal weir ought to follow as the necessary consequence of a certain finding stated in the case. It has ordered a conviction on this finding, and directed the magistrates to fix the proper fine. Whether the magistrates' finding was a just conclusion from the evidence was not before this Court. It could not be brought before it by a proceeding under a statute which applies only to the decision

Q. B. Div. 1899.

THE QUEEN v. JUSTICES OF WATERFORD

Madden, J.

of questions of law. It is the proper subject-matter of an appeal to Quarter Sessions, subject to the statutory provisions that a person aggrieved by an order of Justices must make his election between an appeal by case stated on a question of law, and an appeal to Quarter Sessions under the Petty Sessions Act. But the time for making this election cannot arise until an appealable order is made—that is to say, in the present case, until the final adjudication of the Justices acting under the order of this Court. It could hardly have been the intention of the Court that its order should have concluded the parties as to a matter with which it did not deal—the amount of the fine. The order is absolutely conclusive as to what it did decide: that is to say, upon the legal proposition that the finding of the Justices ought to be followed by the conviction of the appellants. I do not think that the prosecution of the appeal is at all inconsistent with the conclusiveness of the order of this Court. Indeed, so far as the fine is concerned, the right of appeal seems to me to follow from this order, in so far as it refers this matter to the adjudication of the Justices. In my opinion, questions as to the correctness of the findings of fact upon which the conviction is based, as well as the amount of the fine, are open upon the appeal. If, however, the Court of Quarter Sessions concur in those findings, they are bound under the order of this Court to convict. But, upon the question of the amount of fine, they have no such guidance.

Having regard to the conclusions at which I have arrived, I express no opinion as to the preliminary objection raised by Mr. Sullivan.

Solicitor for applicant: *A. Carroll.*
Solicitor for defendants: *W. J. Verlin.*

A. E. R. J.

M'EVOY *v.* THE GREAT NORTHERN RAILWAY COMPANY (1.)

(1898. No. 3994.)

Q. B. Div. 1898. Nov 14, 15.

Appeal. 1899. Jan. 26.

Easement — Watercourse — Prescription — Railway company — Claim to the enjoyment of water flowing in an artificial channel along a railway company's permanent way.

Prior to 1849 the plaintiff's predecessors had enjoyed the right to take water from a natural stream flowing near their holding. In 1849, the defendant railway company, in the course of the construction of their line, interfered with or tapped the subterraneous sources of this stream which ceased thenceforward to flow, the water that had supplied it finding its way to the surface at a cutting on the company's line. This water the company conveyed along and away from their line in a new artificial channel. The water of this new stream was not until 1898 used by nor was it of any use to the company. In 1898 the company commenced to make use of this water supply for their own purposes, and the plaintiff, who had been taking the water thereof since 1849 for domestic purposes, brought an action for disturbance of a prescriptive right. The jury found that the new stream was substituted for the old, and that the company had not constructed the new channel until they should require to use the water for their own purposes. On new trial motion:—

Held, that this new artificial watercourse being made for the benefit of the company on the company's own land, no enjoyment of the water thereof while the water was of no use to the company could create a prescriptive right in the plaintiff; and, further, that the existence of such a right would be inconsistent with the purposes of the incorporation of the company, and with the obligations of the company to provide for the security of their permanent way and the safety of the public; and that, the new artificial stream not being the same as the stream formerly in existence, no contract in regard thereto, as an "accommodation work" within section 16 of the Railway Clauses Act, 1845, could be presumed.

NEW TRIAL MOTION.

This action, which was tried before Mr. Justice Johnson and a common jury in Trinity Sittings, 1898, was brought by the plaintiff

(1) Before PALLES, C.B., and O'BRIEN and GIBSON, JJ.

Q. B. Div. 1898.

M'Evoy v. Gt. Northn. Railway Co.

for damages caused to him by certain works on the defendant company's line at Loughhill, in county Armagh, whereby the plaintiff was deprived of the flow of a certain stream to the use of which he was entitled in connexion with his adjoining farm and dwelling house.

The facts, so far as material for the purposes of this report, may be taken to be as follows. Prior to the construction, in 1849–50, of the defendant company's line, a certain natural stream, one of the main sources of which was a large spring (the "Glory well") on adjoining lands, flowed past the holding now in the occupation of the plaintiff; and the plaintiff's predecessor, and other neighbouring occupiers, then used the water of this stream as of right. In 1849–50, in the course of the construction of the railway line, a "cutting," some 30 feet deep in parts, was made, in pursuance of the company's statutory powers, at some short distance from this well or spring. The well dried up, and the water that used to issue therefrom thenceforth found its way, through the porous rock at the side of the cutting, to the surface, and then flowed, along an artificial channel, made by the company at one side of the permanent way, past the plaintiff's holding. From 1849, onwards, the plaintiff's predecessor and the plaintiff, and other adjoining occupiers, made use of this new stream for all purposes for which the former stream had been used by them. The defendant company did not, until 1897, require the flow of water for any purposes of their own, their sole concern being to get rid of the water, as being a possible source of danger to the line, and to conduct it away, along the channel they had made, into a larger stream at some distance. This channel was throughout within the company's limits of deviation. In the year 1897 the company, in order to obviate the necessity of procuring water at heavy rates from the Dundalk Commissioners, commenced to make use of the water flowing in this channel, thereby depriving the plaintiff of its enjoyment. The defendants pleaded (besides traverses) that, having occasion to procure a water supply for their station at Dundalk, they procured same from springs on their own lands, constructing expensive works for that object, and that the plaintiff acquiesced in and consented to what was done by them; that, further, by the Dublin and Belfast Junction Railway

Act, 1845, a railway company, subsequently incorporated with the defendant company, was empowered to construct a line past the lands in question, and for that purpose to acquire certain necessary lands; that in making the railway certain springs were opened on lands acquired by the company for the purposes of their undertaking; that the waters of these springs, not being immediately required for the undertaking, were conveyed in a channel made for that purpose on the lands of the company to a lower main stream, so as to get rid of such water for the convenience of the railway until required for the use of the railway; and that the defendants, having acquired said railway, required the use of such water and diverted it accordingly.

The learned Judge at the trial directed a verdict for the defendants, but, in order that the Divisional Court might have before them the findings of the jury on the matters of fact in issue, left three questions to the jury, which they answered as follows:—1. Prior to the making of the railway there was a stream, running on or near the line of the present stream, which supplied the plaintiff, and other adjoining occupiers, with water for their farms. 2. The present stream was substituted for the old stream. 3. The railway company did not construct the trench and convey into it the water off their permanent way until they should require to use the water for the purposes of the railway.

Defendants' counsel had asked for a direction on the grounds—(*a*) that the alleged interference was merely interference with artificial water on the company's own land flowing in a channel made by the defendant company for their own purposes merely; (*b*) that the interference in 1849–1850 gave no right of action, but a claim at most to compensation; (*c*) that the railway company, having made their line and constructed this channel within their limits of deviation, became and were absolute owners of the flow of water in such channel; and (*d*) that the plaintiff could not acquire any of the company's property by prescription against the company. Counsel for the defendants objected to any question being left to the jury; and both parties objected to the third question. The plaintiff's counsel asked that the following further questions should be left to the jury, but the learned Judge

Q. B. Div. 1898.

M'Evoy v. Gt. Northn. Railway Co.

declined to do so. 4. Was the present drain made as a permanent drain to carry water from the railway past plaintiff's lands to the river below? 5. Has the plaintiff used the water of the stream for the purposes of his farm since it was made by the company?

The learned Judge directed verdict and judgment for the defendants, with costs, staying execution.

The plaintiff moved to change the verdict and judgment so entered, relying on the findings of the jury: or, in the alternative, for a new trial on the ground of misdirection, the rejection of legal evidence, and the refusal of the learned Judge to submit to the jury questions proper for the trial of the action.

Serjeant Dodd and *Cuming*, for the plaintiff:—

The findings of the jury show that the company's works, in 1849–1850, were not a mere interference with an undefined underground channel or source, or with a particular well or wells, but with an existing stream flowing on the surface of the land, for which the company caused the present stream or channel to be substituted. Cases therefore like *Chasemore* v. *Richards* (1), &c., are not in point here. The jury have further negatived the suggestion that the diversion of the water into the new channel was intended to be for the company's own temporary accommodation, or "until they should require to use the water for the purposes of the railway." Cases therefore of which *Arkwright* v. *Gell* (2) and *Wood* v. *Waud* (3) are types, do not govern the present.

That substitution for the former watercourse (which was the subject of an undoubted right in the plaintiff) of a new permanent (though artificial) stream, as has been found by the jury, must by necessary inference have taken place—in the absence of any compensation given to those whose rights were injuriously affected—with the consent of the then occupiers of the land (including the plaintiff's predecessor). That consent implied and involved a contract between the parties that the then occupiers and their successors should have the like easement in the new watercourse that they had in the old; and the new channel must be regarded

(1) 7 H. L. C. 379. (2) 5 M. & W. 203. (3) 3 Exch. 748.

as an accommodation work within section 16 of the Railways Clauses Act, 1845 (8 & 9 Vict. c. 20).

Would such a contract be illegal, or contrary to public policy, or *ultra vires*? We submit not. No doubt the railway company could not legally enter into a contract which was not in conformity with the purposes of their incorporation; no doubt it would not be competent to them to bind themselves to refrain from exercising the statutory powers given to them for certain *quasi*-public purposes: *Ayr Harbour Trustees* v. *Oswald* (1); *Ashbury Railway Carriage and Iron Company* v. *Riche* (2). No doubt they were under an obligation, in order to prevent danger of flooding and consequent risk to life, to take all proper precautions to convey the water flowing from this cutting along and away from their permanent road; and an agreement (or the creation of any prescriptive right) which would prejudice their powers to take such precautions, would be illegal. But where, as here, they had fully secured their object, and the safety of the public, by conducting this water along a permanent channel away from their line, rights might, we submit, lawfully be granted by them to others, or might arise through long enjoyment, in regard to the use of the water; and the creation of and the existence of such rights would not be against public policy, or *ultra vires*. The safety of the public had been sufficiently assured; and, further, the company (if risk should arise) would still, we freely admit, be entitled to enlarge or alter the channel. How then can a mere right to take and use this water (which so far as the company was concerned was waste and useless) affect the security of the line or be inconsistent with the public objects of the company? The right here claimed is solely to *take* the water, not to pen it back by a weir. That might involve danger, and be open to real objection—though this is apparently the very thing the company itself is now attempting to do. The present case, therefore, comes into line with *Athol* v. *Great Northern Railway Company* (3), a demise of surplus water by a Canal Company. See, too, *Grand Junction Canal Company* v. *Petty* (4), distinguishing *Mulliner* v. *Midland Railway Company* (5), and following *Reg.* v.

(1) 8 App. Cas. 623.
(2) L. R. 7 H. L. 720.
(3) Ir. R. 3 C. L. 333.
(4) 21 Q. B. D. 273.
(5) 11 Ch. D. 611.

Q. B. Div. 1898.

M'Evoy v. Gt. Northn. Railway Co.

Leake (1), where the principle was laid down that a dedication by a public body of a public right of way over land vested in them for special purposes, while it would be unlawful if they were bound to use the land for special purposes incompatible with its use as a way, would nevertheless be lawful "if such use by the public be not incompatible with the objects prescribed." See also *Forster* v. *London, Chatham, and Dover Railway Company* (2), where, the defendant company, having acquired a strip of land, and thereon carried their line over a series of arches, afterwards let the interiors of the arches to tenants, reserving power to resume possession when they deemed it necessary for the purposes of the railway so to do; and it was held that such lettings were not inconsistent with the purposes for which the company was constituted: see, too, *Great Western Railway Company* v. *May* (3); *The Attorney-General* v. *Great Eastern Railway Company* (4); and *Powell* v. *Butler* (5). The decision in *Forster's Case* (2) of the Court of Appeal would have been the same, we submit, even had there been no power to resume contained in the contracts of tenancy, for (even without such reservation) the Courts would uphold the right of the company at any time to enter for the purpose of repairing or strengthening the arches in order to secure the safety of the public.

The last of this line of cases, *Re Gonty & Manchester, Sheffield, and Lincolnshire Railway Company* (6), is, we submit, a strong decision in favour of the plaintiff here, showing that such a grant or easement as is here set up is not inconsistent with the purposes of the company and is possible in law. If the plaintiff's claim be possible in law, the Court must give effect to it.

J. H. Campbell, Q.C., and *Harrison*, for the defendant company:—

This is not, upon the facts in evidence, a case of diverting an existing stream, but a case in which a railway company, acting under the authority of statutory powers had "tapped" in the course

(1) 1 B. & Ad. 469.
(2) [1895] 1 Q. B. 711.
(3) L. R. 7 H. L. 283.
(4) 5 App. Cas. 473.
(5) Ir. R. 5 C. L. 309.
(6) [1896] 2 Q. B. 439.

of their works the underground sources of a neighbouring well, and had conducted the water along the line for their own purposes and own convenience. The principles of *Chasemore* v. *Richards* (1), &c., and *Arkwright* v. *Gell* (2), &c., therefore apply, and the plaintiff has no right of action. Further, to allow the establishment of an easement of the nature claimed would be dangerous to the public, contrary to public policy, and inconsistent with the objects for which the company was incorporated. Even an express grant of such a right would be *ultra vires* and a nullity: *Ayr Harbour Trustees* v. *Oswald* (3), &c.; and therefore such a right as is here claimed can neither be presumed from user, nor created by prescription: *Dalton* v. *Angus* (4); *Staffordshire, &c., Canal Company* v. *Birmingham Canal Company* (5).

Cuming, in reply.

PALLES, C.B.:—

To determine the questions which have been argued in reference to the right to the stream in dispute, it is necessary in the first instance accurately to examine its nature and character. Prior to the construction of the railway, there was a stream of water which had its origin in, and flowed down, from a well called the "Glory well," over the surface of the land, to a place where a portion of the railway was afterwards constructed. During the construction of the railway at a point at some little distance from this stream when the works were being executed in a cutting, at a depth of fifteen feet, a quantity of water found an exit from the side of the cutting, and has since continued to flow from it, and the water which so flows is the stream in question here. Contemporaneously with this body of water commencing to flow, the stream which formerly existed ceased to flow. It is possible—indeed I am willing to treat the case as if it were certain—that part of the water, which so found its exit from the side of the cutting, was water which, but for that cutting, would

(1) 7 H. L. C. 349.
(2) 5 M. & W. 203.
(3) 8 App Cas. 623.
(4) 6 App. Cas. 795.
(5) L. R. 1 H. L. 254.

Q. B. Div. 1898.

M'Evoy v. Gt. Northn. Railway Co.

Palles, C.B.

have either percolated or run through a defined (but unknown) channel into the well, and, flowing thence, would have constituted part of the old stream; and I assume that the plaintiff had some right to the water in that old stream. His contention is that, by reason of that old right, he now has a right in the new stream, *i.e.* in that which, from the formation of the railway, has run, and which still continues to run, from the side of the cutting along the railway line.

I am unable to agree in this. The rights to this new stream of water are so well settled that it is impossible that any question as to them can be entertained by the Court. *Acton* v. *Blundell* (1), *Galgay* v. *The Great Southern and Western Railway Company* (2), *Chasemore* v. *Richards* (3), *Ewart* v. *Belfast Poor Law Guardians* (4), and other cases, establish beyond controversy that where a stream has ceased to exist by reason of interference—by artificial means, at a point higher up than the head of that which in law constituted the stream—with percolating water, or water flowing in an unknown subterranean channel, which, if not interfered with, would ultimately have made its way to the spring-head of the old stream, such interference does not constitute a cause of action, and that the rights to the new flow thus caused by artificial means are in no respect regulated by the formerly existing rights in the old stream. The old stream in the present instance was a natural one; the new stream is beyond all doubt an artificial one, and the rights of the parties must be regulated on that basis.

As this water which thus flowed from the side of the cutting reached the land which was to become the permanent way of the railway, it became necessary that the company should so lead it away as to prevent it flooding or injuriously affecting their line; and, accordingly, they constructed, as part of their permanent works, and in entirety on their own lands, a certain dyke or water-course by which the water which escaped from the side of the cutting flowed for a considerable distance along the side of their

(1) 12 M. & W. 324.
(2) 4 Ir. C. L. R. 456.
(3) 7 H. L. Cas. 349.
(4) 5 L. R. Ir. 536; 9 L. R. Ir. 172.

line, and ultimately emptied itself into a river. It appears to me that the only reasonable inference that can be drawn from these and the other facts proved is that this dyke or water-course was made solely for the benefit of the company.

In arriving at this conclusion, I do not overlook the user by the plaintiff, and by the other occupiers of adjoining lands, of the water of the new stream; but the effect, if any, which this circumstance might otherwise have had, is, to my mind, neutralized by the consideration that, until the acts now complained of, the water was useless to the defendants, that their object was, *not* to preserve it as a valuable commodity, but to get rid of it, an object which was equally satisfied by its being used by adjoining occupiers, as by its being carried into the main river.

It is settled law that the rights to the water flowing in an artificial water-course constructed by a particular person upon his own land and for his own benefit are not regulated by the law applicable to natural water-courses, but are to be ascertained by a view of the purpose for which the original structure was built: *Arkwright* v. *Gell* (1); *Wood* v. *Waud* (2). In *Powell* v. *Butler* (3) the drain was constructed through the lands of *several* tenants; the consent of each was necessary to its construction; its construction was an equal benefit to each; the circumstances were such that each had a *right* to use it, so long as it continued to exist; and, after twenty years' enjoyment, it was held that each of them had acquired a prescriptive right to the flow. I regard that decision as absolutely right, having regard to its special circumstances; but I equally hold that, as a general rule, circumstances which are sufficient to create an easement in favour of a particular person, do not necessarily subject the land of that person to the servitude of continuing to maintain in existence, for the benefit of the servient tenement, the works constructed by him for the purposes only of that easement. In other words, the existence of an easement does not carry with it any presumption of the creation or existence of a counter-easement in the owner of the servient tenement against the owner of the dominant tenement.

(1) 5 M. & W. 203. (2) 3 Exch. 748. (3) Ir. R. 5 C. L. 309.

Q. B. Div. 1898.

M'Evoy v. Gt. Northn. Railway Co.

Palles, C.B.

Certain circumstances may give rise to such counter-easement. The circumstance that part of the works executed on the lands of another are such as to require the consent of the owner of the servient tenement may in certain circumstances tend to do so, especially in cases in which the easement has been acquired by prescription, and in which the circumstances of the original structure, or its subsequent use, indicate an intention that it was constructed for the benefit of both tenements. But no case of this exceptional class has any application to the present; for here all the works were on the defendants' own land; the consent of those from whom the plaintiff claims was not necessary for their legality; and the only inference capable of being drawn is, as I have already said, that they were constructed for the sole benefit of the railway company. Therefore, I should have been prepared to hold, were we dealing now with a common person, and not with a corporation created by statute for certain special purposes, that there was no evidence to go to a jury of any prescriptive right created by user. I need not refer to cases further than to say that the judgments in *Mason* v. *The Hereford Railway Company* (1) appear to me to establish everything I have said to the present.

That, however, is not the entire of this case, as here the works were executed, not by a common person, but by a corporation, created by statute for the special purpose of making and maintaining this railway. It is well settled that, though a presumption of grant is not now necessary to found a prescriptive right, still there can not be a prescription if the owner of the servient tenement be so restrained by statute, or by the common law, as to be incapable of granting the easement in question. The judgment of Lord Westbury in the *Staffordshire, &c., Canal Proprietors* v. *Birmingham Canal Proprietors* (2), and that of Lord Selborne in *Dalton* v. *Angus* (3), amply establish this.

Thus we are driven to the inquiry whether it would have been competent to this railway company to grant this right, which, it is contended, has been acquired by prescription. Now a line of cases,

(1) L. R. 6 Q. B. 578. (2) L. R. 1 H. L. 254, 278, 279.
(3) 6 App. Cas. p. 795.

of which *The Ayr Harbour Trustees* v. *Oswald* (1) is an example, establishes the proposition that a company incorporated for a particular purpose cannot make a grant which would be inconsistent with the purpose for which it was incorporated. I freely admit that they may deal with their property in any way not inconsistent with the purposes of their incorporation, and from which they are not restrained either expressly or impliedly. All the cases cited by Mr. Cuming are of the latter character. In *Athol* v. *The Midland Great Western Railway Company* (2), the question was as to a sale of *surplus* water not required for the purposes of the canal. In *The Grand Junction Canal Company* v. *Petty* (3), what was granted was a public way over that which under the statute should for the purposes of the canal company be preserved *as a way*, viz. a towing path. In *Foster* v. *London, Chatham, and Dover Railway Company* (4), the letting of the archway was temporary merely. In *Norton* v. *London and North Western Railway Company* (5), and *The Great Western Railway Company* v. *May* (6), the sales were of *superfluous* lands, which not only might be, but ought to have been, sold by the company. *Re Gonty and Manchester, Sheffield, and Lincolnshire Railway Company* (7) goes no further than this that, in the case of a person whose lands are severed by a railway, and who requires a means of access from one of the severed portions to another, a right of way may be lawfully granted by the company over lands acquired by them for the purposes of their Act, but this is no more than can be done under the Railway Acts, wherever lands are intersected by a railway, and a communication is required between the two intersected portions.

From these cases we derive no assistance, and we are therefore driven back to the real question, viz. whether such a grant as is here suggested would be inconsistent with the purposes for which the company was incorporated. Was it inconsistent with the objects of their incorporation that they should part with this right? In

(1) 8 App. Cas. 623.
(2) Ir. R. 3 C. L. 333.
(3) 21 Q. B. D. 273.
(4) [1895] 1 Q. B. 711.
(5) 13 Ch. D. 268.
(6) L. R. 7 H. L. 283.
(7) [1896] 2 Q. B. 439.

Q. B. Div. 1898. M'Evoy v. Gt. Northn. Railway Co. Palles, C.B.

considering this question we must bear in mind—as did Jessel, M.R., in *Mulliner* v. *The Midland Railway Company* (1) (a case expressly affirmed by the House of Lords in *The Ayr Harbour Trustees* v. *Oswald* (2)), that we cannot confine our consideration to the present time; we must extend it to all futurity. This company is under a perpetual obligation to keep this line free from danger arising from water, one of the most usual sources of danger to railways, when allowed to approach the permanent way. The usual, indeed the primary object, of dykes like the present along a railway is not to preserve the water, as the property of the company, as the grass grown upon the embankments is sometimes preserved, but to lead it away and so to preserve the line in that safe state in which the public are entitled to expect that it shall be kept. For this reason it is in the highest degree essential that the company should not be allowed to part in any mode with their control over the water, or in any way to interfere with the absolute discretion of their directors and officers in using such means as shall from time to time be the most efficient to prevent the water from injuriously affecting the line. The directors and their officers must be at liberty, not only now, but in the future, to adopt the best means that may from time to time be known to science for effecting this purpose, and they cannot be allowed to so fetter themselves that at some future time they shall be unable to make use of any new and reasonably effective invention to guard the line from this source of danger. For these reasons I am of opinion that any agreement by a railway company to confer in perpetuity such a right as is here claimed by the plaintiff, or to take away or control the discretion of its directors and officers in this respect, is inconsistent with the purpose for which the company was incorporated, and accordingly would be illegal and void.

It is right that I should say one word as to the mode in which Mr. Cuming presented this case to us, the only mode in which it could legally be presented. "The company," he said, "when constructing their line interfered with this stream; it was then an existing stream, to the benefit of which the plaintiff, or his predecessor, was entitled; the company did this under the provisions of

(1) 11 Ch. D. 611. (2) 8 App. Cas. 623.

their Act, which obliged them to give compensation; the company, therefore, might have entered into an agreement as to this water-course, so as to limit the amount of compensation to which the plaintiff's predecessor would otherwise have been entitled; and the jury might, therefore, have inferred that such an agreement was in fact entered into."

Now, if Mr. Cuming could show that the stream as it now is was identical with that which was interrupted by the company's works, I could agree with his conclusion; but in that event I should have decided in his favour, not exactly upon the argument presented to us by him, but because the case would in that event have been brought within section 16 of the Railways Clauses Act; and the company could lawfully have contracted in regard to the matter as an accommodation work. But the true answer to his contention—an answer which I deem a fatal one—is that there is no identity between the two streams. The stream ceased to exist by reason of the percolation of the water to the cutting having led the water away, and thus prevented it from entering the spring-head of the well. Thus the old stream was extinguished. An arrangement might no doubt have been made, under section 16, as to the stream as it existed in 1849; but I am of opinion that no arrangement could have been lawfully made under that section in regard to the new stream; and, if the case be outside the 16th section, the argument upon this point altogether fails.

The verdict for the defendants must stand.

O'BRIEN, J.:—

I agree in the conclusion announced by the Chief Baron, and especially on the last ground. I arrive, however, at this view with very great reluctance, for I am of opinion that, in this instance, law of a very strong kind has been used to defeat a right which has existed for over half a century, with grave results of personal inconvenience to a large number of people; and I have very little doubt that this state of things arose, if not out of an actual contract that could be maintained in a Court of law, yet out of a real and substantial agreement between the company and the persons who used this well as it existed in 1849. These were people in a humble rank of life, who may well have thought that

Q. B. Div. 1898.

M'Evoy v. Gt. Northn. Railway Co.

O'Brien, J.

they were bound to acquiesce in any terms imposed upon them by the influential company by whom this line was being constructed through or beside their holdings; and they may easily have been led to an informal agreement with the representatives of this company. Certainly, if the question were open, I should be led to the distinct conclusion that there was an agreement between them of some sort, by which, by reason of all claim to compensation at the time being abandoned, it was arranged that this water should be conducted into a new channel for the convenience of these farmers; and I have not any doubt but that this was the real truth of the case. The contractor had, however, no authority to make an agreement that would necessarily affect the rights of the company for all future time; and, although the consideration is one which the company have now repudiated, in a very unusual manner, seeing that now, after so long a lapse of time, they have chosen to deprive these people of the use of the stream, still, although they had entered into such an arrangement originally, and had permitted the user for the purpose of getting rid of liability to compensation, we are, nevertheless, forced to hold that they are now at law entitled to assert their right to turn it into a very valuable asset for themselves.

It was early foreseen, and it was urged upon the Judge at the trial, that it was not competent to the railway company to enter into any such agreement at all. The company possessed statutory powers to construct a certain railway, which they were bound to superintend, maintain, and manage, with every regard to the safety of those who used it; and certainly, not only from the point of view suggested by the Chief Baron, but for many other reasons also that might be suggested, it would be inconsistent with the powers of the directors that they should attempt to dispose of property acquired by the company in a manner which obviously conflicted with the objects for which the company was formed. This was not the case merely of superfluous water as in *Athol* v. *The Midland Great Western Railway Company of Ireland*(1), but a case in which the right contended for by these farmers, if successfully established, would give them for all time the use of

(1) Ir. R. 3 C. L. 333.

this water as a right, and would fix upon the company a continuing liability to maintain the flow along the channel in question. It would be a very strong thing to hold that a railway company could be bound for all future time to maintain a water-course along their line, with a result of great possible inconvenience and, perhaps, danger. If a complete case could have been made out that there was an agreement, whatever the form might have been, between the company and these persons, that the latter were to accept an arrangement by which the new water-course should be turned into a supply for them in the place of the old stream, and if it could have been shown that this was carried out in such a way as to demonstrate the intention of the railway company to give to the adjoining owners the use of this water, I should, I confess, have had great difficulty in agreeing in the view of the Chief Baron that, though these people could make use of the water so long as it flowed, the company, notwithstanding this, might at any time cut off the supply. However, the facts that would raise this question do not arise in the present case at all, for, when the company first made the stream to run in its present channel, it must be taken that they did so in the ordinary way and for the purpose simply of getting rid of a dangerous element. They certainly then had no intention of themselves making any use of the water. Things have changed now, and without the advantage of possessing any moral right at all, but depending wholly on legal authority, which has been so long sustained that it cannot now be controverted, they take away this water for their own purposes.

I agree in the view that it is not in the power of such a company to dispose of their property so as to prevent any change being made in the future that may be required for the purpose of maintaining their line and guarding the safety of the public.

GIBSON, J.:—

I agree. I abstain entirely from criticising in any way the action of the company in the exercise of their statutory powers. If they were to submit to the right now claimed, it might encourage attempts to establish an easement of the like kind against every other railway company in Ireland. It appears

Q. B. Div. 1898.

M'Evoy v. Gt. Northn. Railway Co.

Gibson, J.

that the water filling the well was tapped under circumstances that gave to the people who used the well no right of compensation or of action. The original stream from the well ceased to exist under conditions which could throw no liability upon the company. In my opinion the new stream, created by the effluent water flowing throughout on the company's land, was not affected by any rights whatever that may have existed in regard to the old well, and cannot now be the subject of any right as against the company. The tenant farmers who occasionally have used the water running in this ditch, for their cattle, or for domestic purposes, cannot establish in perpetuity a right to its enjoyment. There is the further difficulty, the difficulty of establishing any prescription where it would have been impossible for the company legally to have made a grant. Prescription is only to be applied in lieu of such a grant; and, where there could be no power to make a conveyance, there is no possibility of establishing an easement by user. The 16th section of the Railways Clauses Act, which was referred to by the Lord Chief Baron during the argument, was not relied upon or mentioned at the trial. It is manifest that what was done was not a diversion or alteration of the course of the stream; it was the death of the old, and the birth of a new, water-course. The section in question cannot, therefore, have any application to the case. I agree in the conclusion stated by my Lord. The motion will be refused with costs.

A. E. R. J.

Appeal. 1899. Jan. 26.

The plaintiff appealed to the Court of Appeal (Lord Ashbourne, C., and Fitz Gibbon, Walker, and Holmes, L.JJ.), who, without calling on the respondents, affirmed the decision of the Divisional Court with costs.

Solicitor for plaintiff: *Michael C. Moynagh.*
Solicitors for defendants: *Crawford & Lockhart.*

G. Y. D.

GORMAN *v.* THE WATERFORD AND LIMERICK RAILWAY COMPANY (1).

Q. B. Div. 1899. Nov. 22, 28.

Railways Clauses Acts—Tramways (Ireland) Acts—"Light railway"—Level crossing—Gates—Duty to employ persons to open and shut such gates.

A light railway (or tramway) constructed under the Tramways (Ireland) Acts is not subject to the regulations as to gates and persons in charge at level crossings imposed by the Railways Acts. In the case of such light railway or tramway the obligation in this respect is that imposed by the Tramways (Ireland) Acts and by the terms of the Order in Council and Grand Jury Presentment authorizing the undertaking.

CASE STATED, pursuant to 27 & 28 Vict. c. 99, sect. 35, by Mr. Justice Murphy, on the hearing before him at the Summer Assizes for County Sligo, of a civil bill appeal from a decree for £20, awarded by the County Court Judge, for damages for the killing of the plaintiff's sheep on the defendant company's railway line. The Collooney and Claremorris Light Railway, on which the sheep were killed, was constructed by Messrs. Fisher and Lefanu, in the year 1891, out of moneys advanced by the Treasury; and the line, when completed, was transferred, with the sanction of the Treasury, under the Transfer of Railways Act, 1890, to the defendant company, who (it was found) "worked it as part of their system." The sheep in question and others had strayed off the plaintiff's lands, which were situate about half a mile from the line and did not anywhere abut on it. They had got out upon the public road from Sligo to Collooney, and, passing along it, had got upon the railway line (which here ran parallel and close to the road), through an open gate, at a point where a lane, branching off from the public road, intersected the railway line. The sheep were found dead a mile lower down, and it was assumed that they were killed by a passing train. The lane, after crossing

(1) Before SIR PETER O'BRIEN, L.C.J., and MURPHY, GIBSON, and MADDEN, JJ.

Q. B. Div. 1899.

GORMAN v. W. & L. RAILWAY CO.

the railway line, ran to and across another county road. It was not repaired by the county, and was in part grass-grown; but the learned Judge found as a fact that it was a public pass, and could be used for cars and carts by all persons, and that it was used by the public on foot and with cars, carts, and horses. Where it crossed the railway there were, at each side of the line, single gates, fastening by a latch and opening out to the road on one side and a field (through which the lane went) on the other. The contractors by whom the line was made had not built any lodge or cottage at these gates, and none such had been required to be made by the final award or deposited plans (referred to in the case), which merely provided for gates; and these (it was found) were most frequently left open. It was proved that, after the acquisition of the lands for the purposes of the railway, the contractors' engineer had acquired by contract for a small sum, from the occupier of the land adjoining the gate, some four perches of land on which a cottage could have been built, and had stated at the time that this plot was required for building a cottage. It was contended before Murphy, J., that the company was under no duty to see that the gates were kept shut, as they were not "gates on a turnpike road or public carriage road" (Railway Clauses Act, 1845, 8 Vict. c. 20, sect. 47), and that the company were not required to construct or maintain a lodge or gate-keeper's cottage, as they would be at the intersection of such a road; and further, that, even assuming they were under such a duty, they were not liable to the plaintiff, as his sheep were straying unattended on the public road, and therefore were trespassers. The learned Judge expressed the view that in his opinion the decree should be affirmed, but consented to state this case for the opinion of the Court (it being agreed that the defendants should in any event pay the plaintiff his costs of the case) on the question whether the Judge was right in deciding to affirm the decree below or not.

Coll, for the defendant company:—

This lane is not "a public carriage road" within sect. 47 of the Railways Clauses Act of 1845; but, whether or not, that section has no application here. The Tramways and Light Railways Acts are a code completely distinct from the Railways Acts.

In the construction of a railway the protection of the public is secured by the provisions of the Railways Clauses Acts; in the case of a tramway or light railway the same object was attained by the regulations as to the deposit of plans, sections, &c., by the right of interested persons to oppose the scheme, by the necessity of obtaining the concurrence of the Grand Jury and Presentment Sessions, and by the powers of supervision given to the county surveyor. The general form of Order in Council (see Privy Council Order, 1883, Schedule C, Article 38) expressly exempts from the incorporation there of the Railways and Lands Clauses Acts, 1845, and the Railways (Ireland) Act, 1851, "the provisions of the said Acts . . . with respect to the crossing of roads, and other interferences therewith (other than the provisions of the Railways Clauses Consolidation Act, 1845, sects. 65, 66, 67)." *Matson* v. *Baird* (1) strongly supports this distinction. There it was held that a private railway on private property, made and used exclusively for the proprietors' own purposes, was not subject to the regulations as to gates and persons in charge at level crossings imposed by the railway statutes, and that the proprietors of the line in question, who could not have made the line across a turnpike road on a level without the leave and sufferance of the road trustees (who could have imposed any conditions they thought right), were not liable in damages for injury to a horse that had strayed off the road on to their line, there being no obligation on them under the railway statutes to fence with gates the railway where it crossed the high road.

Henry, Q.C., for the plaintiff:—

This lane is a "public carriage road," within sect. 47 of the Railways Clauses Act, 1845; and, if that section applies, the defendants were under an absolute duty not only to erect good and sufficient gates across such road, but to employ proper persons to open and shut them, and to construct a lodge or cottage for the gate-keeper (Railways Clauses Act, 1863, sect. 6). Even if sect. 47 (1845) does not apply, and the measure of the defendants' duty is to be ascertained from the Tramways Code alone, *i. e.* from

(1) 3 App. Cas. 1082.

Q. B. Div. 1899.

GORMAN v. W. & L. RAILWAY CO.

the company's deposited plans and schedules, the Grand Jury Presentment, and the Order in Council, the duty to "erect gates" at this point necessarily involves a duty to keep them in order and closed at all proper times; otherwise this provision, for the protection of the public and of property, would be utterly useless; and it involves that such gates should be kept under the control of the company, whose servants, it is submitted, alone have the right and the duty to open and close them: see *Wyatt* v. *Great Western Railway Company* (1). Again, even if sect. 47 (1845) was inapplicable prior to the date when the undertaking was transferred to the defendant company, still, once that transfer was effected, under the Transfer of Railways (Ireland) Act, 1890 (54 Vict. c. 2), the defendant company became bound "at all times efficiently to work the undertaking as part of their own railway system" (54 Vict. c. 2, sect. 10), and therefore this part of their system became thenceforth subject to the provisions of sect. 47 of the Act of 1845.

[Counsel for the plaintiff also relied on sect. 68 of the Railways Clauses Act, 1845 (accommodation works and fences). On this, *The Manchester, Sheffield, and Lincoln Ry. Company* v. *Wallis* (2); *Ricketts* v. *East and West India Docks, &c., Railway Company* (3); *Fawcett* v. *York and North Midland Railway Company* (4); *Luscombe* v. *Great Western Railway Company* (5); and *Dovaston* v. *Payne* (6) were cited during the argument.]

Cur. adv. vult.

Nov. 28.

GIBSON, J.:—

Mr. Justice Murphy takes no part in the decision of this case, he having expressed an opinion upon it in the case stated. The Lord Chief Justice and Mr. Justice Madden agree generally in the judgment which I now proceed to read [His Lordship then read the following written judgment]:—

This case raises a question of much general importance and some difficulty. A light railway constructed and transferred to the defendants under the Transfer of Railways Act, 1890, intersected a lane from which it was fenced off on each side by gates

(1) 6 B. & S. 709.
(2) 14 C. B. 213.
(3) 12 C. B. 160.
(4) 16 Q. B. 610.
(5) [1899] 2 Q. B. 313.
(6) 2 H. Bl. 528.

erected pursuant to the deposited plans. The lane was not repaired by the county and was in part grass-grown, but was a public pass used by the public on foot, and with cars, carts and horses. The lane, just before reaching the railway, crossed a public county road, which ran alongside the railway; and the gates across the lane formed a fence between the road and the line. Certain sheep of the plaintiff's strayed off his land, and made their way along the lane, and, reaching the road, passed by the gate, which was left open, on to the railway, where they were killed. The case does not show that the gate, which on this occasion as on several previous occasions was found open, was left open by any servant of the defendants, nor is any negligence found. The action is based on the supposed absolute duty of the defendants to keep the gates closed. The defendants deny that they are subject to any such obligation, and they contend that they are not under any liability, as the sheep were straying on the highway where they had no right under the circumstances to be.

The alleged obligation is said to be founded on the express provisions of the Railways Clauses Act, 1845, or on an implied duty in relation to the gates which the defendants were bound to construct and maintain. I shall examine these points separately.

First, does the statute of 1845 apply to a light railway at all? It is said on behalf of the defendants that it does not, because—(*a*) the lane was not a public carriage road, and (*b*) because section 47 is excluded expressly by the Order in Council which is deemed to be the special Act of the undertaking under the statute of 1890, section 4, sub-section (*e*).

The 47th section of the statute of 1845 requires that, where a railway crosses any turnpike road or public carriage road on a level, sufficient road gates shall be erected and maintained, and that proper persons shall be employed to open and shut such gates; that the gates are to be left constantly closed save when required to be opened for the purpose of passing, and that they are to be constructed so as to fence in the railway and prevent cattle or horses passing along the road from entering the railway. By the Railways Clauses Act, 1863, section 6, a lodge was required to be constructed at such level crossing, and a proper person was to be appointed to watch and superintend the crossing.

Q. B. Div. 1899.

GORMAN v. W. & L. RAILWAY CO.

Gibson, J.

Section 47 resembles the English Highway Act, 5 & 6 Wm. 4, c. 50, s. 71, now repealed, which requires gates and a watchman where a railway crosses a high road.

The section associates "public carriage road" with turnpike road, which is a highway that the parish was liable to repair, a duty enforceable by indictment: *Trustees of Sunk Island Turnpike Road* v. *Patrington* (1). Does "public carriage road" mean a county road, or does it extend to any public highway used by carriages? The statute uses varying forms of expression. In section 46 it speaks of any turnpike road or public highway, a phrase which does not include a foot-path: *Dartford Rural District Council's Case* (2). Section 49 refers to "any road." If the lane was a highway within section 46, so that it should be carried over the railway by a bridge, according to the normal method of construction, one would expect that, if a level crossing was substituted for a bridge, the protection given by section 47 in the case of level crossings should extend to the lane. Section 71 of 5 & 6 Wm. 4, c. 50, which is on the same lines as section 47, refers to "any highway for carts or carriages." I incline to think that the lane as described in the case was a public carriage road. It is not, however, necessary to decide the point. I have satisfied myself that section 47 does not apply to the transferred undertaking.

The Tramways and Light Railways Code makes the Grand Jury, assisted by the Board of Works, and the Privy Council on appeal, the legislature for the purpose of authorising the scheme and prescribing the terms and conditions on which the tramway or railway is to be constructed. Some conditions are specifically laid down by statute such as that, where a tramway is carried across a public carriage road, on the level, the crossing shall be so described on the section: 23 & 24 Vict. c. 152, Schedule A, Part ii., 8. Under 24 & 25 Vict. c. 102, section 10, the Grand Jury are expressly authorised, with the assent of Presentment Sessions, to permit a tramway to cross a highway, and they may attach to the permission stipulations and conditions which are to operate as if inserted in a special Act. The road gates in the

(1) 1 B. & S. p. 756. (2) [1893] A. C. 210.

present case were shown on the plans, but there was no stipulation that the gates should be kept closed, or that there should be a lodge or watchman. Treating the presentment and the Order in Council as a special Act, it would seem difficult to import into it the provisions of section 47, and thereby increase the liability of the company. The Order in Council expressly excludes section 47. The measure of the company's responsibility is ascertained by what is termed its special Act, and not by the Railways Clauses Acts, save so far as the latter may be incorporated.

It may, however, be said that the Order in Council and statute of 1890 impose on the defendants as transferees the duty of efficiently working and maintaining the transferred undertaking as part of their own system, and that section 47, which admittedly applies to the defendants' original railway, becomes extended to the entire system. I do not think that this can be so. The tramway undertaking, as authorised by the presentment and Order, is transferred. The transfer does not enlarge the liabilities, or the capital outlay to which the transferred light railway is subject. Distinct accounts must be kept, and the expense of a watchman, &c., would come out of the earnings of the transferred undertaking. If the light railway, before transfer, was not affected by section 47, and was under no duty to erect a lodge and keep a watchman at the level crossing, how does the Act of 1890 create such an obligation *de novo*, and attach it to the transferred undertaking in the hands of the defendants?

I am therefore of opinion that neither by its original constitution nor by virtue of the transfer is the transferred railway made liable in the hands of the defendants to the provisions of section 47 of the Act of 1845.

This brings me to the main argument pressed by plaintiff's counsel, namely, that the obligation to erect and maintain road-gates at the level crossing pursuant to the plans carried with it by implication the duty of opening and shutting the gates and keeping them closed. On this view the express provisions in section 71 of the English Highway Act, and section 47 of the Act of 1845, as to the employment of a servant to keep the gates closed, were superfluous. It is not easy to understand why section 47 is expressly excluded if there is an implied duty of the same extent

Q. B. Div. 1899.

GORMAN v. W. & L. RAILWAY CO.

Gibson, J.

resulting from the mere obligation to erect and maintain road-gates. Section 47 ought to have been made to apply wherever the erection of road-gates was made compulsory on the transferred railway.

Wyatt v. *Great Western Railway Company* (1) was relied upon as establishing that the servants of the Company alone were entitled to open gates at a level crossing, and that the same principle applied to the gates here. That case, however, related to an ordinary railway. The local legislation, with which we have to deal, enacts specific provisions and stipulations for the benefit and protection of the public; but how can new and expensive obligations, such as employing a servant to open, shut, &c., be imported into it by implication? Even if *Wyatt's Case* (1) (from which Blackburn, J., dissented, and which has been questioned by Lord Coleridge), was rightly decided, it seems to me that any member of the public going by these gates was entitled to open them for the purpose of passage, and was bound to close them again after use. The mere right or duty to erect gates at the crossing does not impose the liability of keeping a servant there at all times in order to open and shut the gates. A person visiting a residence, approached by an avenue, the entrance to which is closed by a gate without a lodge, is invited to and must open and shut the gate himself.

The plaintiff's counsel contends that the provision for erecting the gates would be useless unless there was a watchman and a lodge. To this there seem to be several answers. The object of the legislation was to provide cheap lines, and the public are only entitled to the protection which the presentment and Order give. The Court cannot by implication impose on the company an onerous obligation which the local legislature saw fit to omit. The gates might, perhaps, have been constructed on a principle producing automatic closing after use. No such term, however, was required. No trace is found in the judgments in *Manchester, Sheffield and Lincolnshire Railway Company* v. *Wallis* (2), or *Matson* v. *Baird* (3), of the notion that the Court could supply the defects of statute law by the violent remedy of implication. Our duty is to construe, not to construct.

(1) 6 B. & S. 709. (2) 14 C. B. 213. (3) 3 App. Cas. 1082.

A great change has come over the attitude of Parliament in relation to steam or electric traction on and across highways. More reliance is placed on the public instinct and capacity of self-protection; and the public danger and inconvenience are supposed to be compensated by the advantages of cheap locomotion. Trains now run on roads where, a few years ago, they would have been regarded as an indictable nuisance.

If the public have to open the gates for themselves they must be on the look-out to see that the line is clear, just as the company must on their part adopt reasonable means, by whistle and otherwise, to signal the approach of danger; and it is the duty and interest of every one, after opening, to see that the gates are closed, inasmuch as an omission to do so would constitute actionable negligence. Here the gate, if left open, would obstruct the county road running parallel to the railway.

If a watchman and a lodge were requisite at every public laneway which a railway, carrying only a few trains a day, crossed, the expense would form a serious item in the accounts, and might make the construction of the railway impossible, or cause a substantial addition to fares.

In many parts of the Continent, where the danger would seem much greater than on this lane, railways cross highroads without any protection of gate, or even of bar, the only safeguard to those using the road being their own vigilance or the whistle of the approaching train. There is a crossing of this kind just outside Homburg where the Usingen line intersects the much-frequented and busy main-road leading into the town. In *Matson* v. *Baird* (1), a private railway, with the permission of the road authority, ran across a public highway without being fenced by gates, and it was held that the owner of the railway was not responsible for an accident thereby caused. The presence of gates is some protection, but the Court cannot enlarge that protection by imposing duties which the Legislature deemed it unnecessary to prescribe.

For the above reasons I have come to the conclusion that there is no express or implied obligation on the company to keep the gates closed or employ a special servant for that purpose. This

(1) 3 App. Cas. 1082.

Q. B. Div. 1899.
GORMAN v. W. & L. RAILWAY CO.
Gibson, J.

conclusion does not exonerate the company from liability for negligence, as for instance where a servant of the company negligently omits to close a gate after opening it, or even possibly where he fails to close it after he finds it left open by some one else; and it may be (though as to this I offer no opinion) that an omission properly to superintend the working of the undertaking, and to guard to some extent against that negligence of the public which is an incident of ordinary life, might in a particular case support an action. The case stated, however, does not find negligence, even if there was evidence to support such finding.

As the company were not bound by any absolute obligation to keep the gates closed, I need not consider whether the fact that the sheep were straying might not be a defence. *Fawcett* v. *York, &c., Railway Company* (1), followed in *Charman's Case* (2), decides that such fact would not be an answer if an express statutory duty to keep the gates closed was violated. But, where there is no such express legislation, and the alleged breach is of an implied duty, or the action is based on negligence, different considerations may possibly arise. Whether, in such case, the reasoning in *Wallis's Case* (3), and in *Luscombe* v. *Great Western Railway Company* (4), may not apply, is a point on which I offer no opinion. Those authorities decide that a railway gate at the side of a highroad is a fence within section 68 of the Railways Clauses Act, and that there is no obligation to maintain the gate for the protection of animals straying and trespassing on the highway. In the present case the gate was at the side of the county road; and, if it is regarded not as stretching across the lane, but as constituting the county road fence, the plaintiff would manifestly have no cause of action. I decide the case, however, on the broad ground that the unqualified duty contended for by the plaintiff does not exist.

Solicitor for the plaintiff: *John Garvey.*
Solicitor for the defendants: *John O'Connor.*

A. E. R. J.

(1) 16 Q. B. 610.
(2) 21 Q. B. D. 524.
(3) 14 C. B. 213.
(4) [1899] 2 Q. B. 313.

REG. (BROWN) *v.* COUNTY COUNCIL OF COUNTY WICKLOW (1).

Q. B. Div. 1899. Oct. 27, 30.

Local Government (Ireland) Act, 1898 (61 & 62 *Vict. c.* 37) *sects.* 109, 115, *and Schedule* vii.—*Compensation to "existing officers"—"County solicitor"—Solicitor for a Grand Jury.*

The solicitor for the Grand Jury of a county is the "county solicitor" referred to in section 115 of the Local Government (Ireland) Act, 1898, and entitled, upon dismissal for some other cause than misconduct or incapacity, to compensation under that Act for loss of office.

MANDAMUS.

This was an application to make absolute a conditional order, dated 1st June, 1899, for a writ of mandamus directed to the County Council of county Wicklow, commanding them, pursuant to the Local Government (Ireland) Act, 1898, and the statutory provisions thereby incorporated, and applied or adopted thereunder, to proceed to take into consideration the claim of the applicant, Mr. Frank Brown, on account of his emoluments as solicitor to the Grand Jury of the county of Wicklow, and that they should proceed to consider and assess the amount of compensation to be paid to Mr. Frank Brown as an existing officer within the meaning of the statute by reason of his dismissal from the office of solicitor to the Council, and that they should thereupon inform Mr. Frank Brown of their decision, and do all acts necessary for the due consideration of his claim, and the assessment of the compensation to be paid to him.

The conditional order was obtained on the affidavit of the applicant, which stated that he had been appointed at the Spring Assizes, 1887, by the Grand Jury of the county as their solicitor, and had continued to act as such solicitor, transacting all the legal business of the Grand Jury, representing the county, down to their

(1) Before SIR PETER O'BRIEN, L.C.J., and MURPHY, GIBSON, and MADDEN, JJ.

Q. B. Div. 1899.
THE QUEEN v. WICKLOW CO. COUNCIL.

last meeting at the Spring Assizes, 1899, when a resolution was passed thanking him for his services. The applicant stated that he had not been employed in any business of the Grand Jury except that of solicitor to that body.

On the 2nd May, 1899, the applicant (who claimed to be an "existing officer" within the Act of 1898, and solicitor to the County Council) attended an adjourned meeting of the Council; but his position as such solicitor was questioned, and a resolution passed that Mr. J. H. M'Carroll, solicitor, attend to the cases of malicious injuries at the June Quarter Sessions at Wicklow, or elsewhere, and should for the future transact any legal business that the Council might authorize him to do. Mr. Brown protested, stating this was tantamount to a dismissal entitling him to compensation, and suggesting, but without effect, that the opinion of the Local Government Board should be taken. On the 16th May, Mr. Brown sent in a formal claim for compensation, with the requisite statutory declaration as to his emoluments during the preceding five years. On the 29th of May he had repeated the request that his claim should receive immediate consideration. The County Council filed an affidavit as cause, in which their secretary stated that, having taken the opinion of counsel, the County Council, at a meeting on the 27th June, 1899, having fully considered the claim, resolved that, in their opinion, Mr. Brown was not an existing officer, or entitled to any compensation.

Wakely, Q.C. (*W. G. Gibson*, with him), for the applicant:—

The post of solicitor to the Grand Jury of a county is a well recognized one, and, since 1836, the universal practice has been for the Grand Jury, by resolution, to appoint a solicitor to transact the legal business of the county, and provision is expressly made (6 & 7 Wm. 4, c. 116, s. 117; 16 & 17 Vict. c. 136, s. 6) for the presentment by Grand Juries of law costs and expenses, when incurred: *Re County Mayo Presentments* (1). The applicant, as solicitor for the Grand Jury, was, on the transfer of the business of that body to the County Council, an "existing officer,"

(1) 14 Ir. C. L. R. 392.

and the "county solicitor" within the Local Government (Ireland) Act, 1898, section 115, and accordingly became on the appointed day an officer of the new council, and upon dismissal is entitled to compensation to be assessed as provided in that section: see the definitions, in section 109, of "existing" and "office." No other official can possibly be pointed at by the title "county solicitor," and the matter is put beyond doubt, we submit, by the form of the second clause of the section, that "for the purpose of this section any . . . *county solicitor* . . . shall be *deemed* to be an officer of the grand jury." The Court must put an interpretation on these words; and the only sensible interpretation is that they are intended to describe the solicitor of the grand jury. In *Reg.* v. *Mayor, &c., of Cambridge* (1), the clerk of a borough council, holding office during good behaviour (whose appointment was, however, void in law, as he had neglected to make the declaration prescribed by 9 Geo. 4, c. 17, s. 2), was held entitled as a *de facto* officer to compensation under 5 & 6 Wm. 4, c. 76, s. 66. Other cases under the last-cited Act are: *Reg.* v. *Mayor of Carmarthen* (2); *Reg.* v. *Mayor of Bridgewater* (3); *Reg.* v. *Mayor of Norwich* (4). In *Reg.* v. *London Poor Law Board* (5), the attorney of a poor law board was held entitled to compensation on the dissolution of the union under 30 & 31 Vict. c. 106, s. 20; and in *Reg.* v. *The Local Government Board* (6), the solicitor to a board of guardians in London was, on deprivation of his office, held to be entitled to compensation under the Metropolitan Poor Law Act, 1867, ss. 74, 76.

The appeal to the Treasury given by Schedule VII. of the Act is appropriate only where the status of the claimant is admitted.

The Right Hon. The Mac Dermot, Q.C., and *T. H. Maxwell*, for the County Council:—

The words "county solicitor" in section 115 are taken from s. 118, sub-s. 13, of the English Local Government Act of 1888, but there is no official in this country to whom the title can be

(1) 12 A. & E. 702.
(2) 11 A. & E. 9.
(3) 6 A. & E. 329.
(4) 8 A. & E. 633.
(5) L. R. 6 Q. B. 785.
(6) L. R. 9 Q. B. 148.

Q. B. Div. 1899.

THE QUEEN v. WICKLOW CO. COUNCIL.

applied. The grand jury had no authority to appoint any officer unless empowered by statute to do so. In *Re Beamish* (1) a presentment of fees to "the coroner's surgeon," was quashed on the ground that this was in effect the creation of an office not warranted by the Grand Jury Acts. The grand jury had no power, therefore, to appoint a solicitor, they merely have power to pay after taxation the costs of any person who may have done law work for them. In any event the applicant's proper course was to have appealed to the Treasury from the refusal of the council to grant any compensation (L. G. (Ir.) Act, 1898, Sched. vii.), and mandamus should not issue.

W. G. Gibson, in reply.

Cur. adv. vult.

Oct. 30

SIR P. O'BRIEN, L.C.J.:—

The question presented for our determination in this matter is an important and interesting one. It is this, whether a person who was appointed solicitor for the grand jury of a county is entitled to compensation on dismissal by the county council for some other cause than misconduct or incapacity. In other words, has a solicitor who held in Ireland the well recognised position of solicitor for a grand jury, the status of an "existing officer" within the meaning of the 115th section of the Local Government Act, 1898. If he has that status he is entitled to compensation on dismissal for some cause other than misconduct or incapacity. It is not suggested that Mr. Brown misconducted himself, or that he was incapable. The 115th section of the Local Government (Ireland) Act, 1898, is as follows:—

"Where the business of any authority is transferred by or in pursuance of this Act to any county or district council, the existing officers of that authority employed in that business and not in any other business of that authority shall become the officers of the council of that county or district, in like manner, subject to the provisions of this section, as if they had been appointed by that council."

(1) Ir. Circ. Cas. 362.

Then follow the important words:—

"And for the purpose of this section any secretary of the grand jury, county treasurer, county surveyor, assistant surveyor, county solicitor, public analyst for a county . . . shall be deemed to be an officer of the grand jury . . . and every existing officer of the grand jury of a county shall be transferred to the council of the county."

It will be perceived that the section uses the words "county solicitor." What is the meaning of these words? To whom do they apply? The Mac Dermot says there is no one to whom they can legitimately apply. But the Legislature introduced the words into the Act; and it is unreasonable to suppose that they were introduced for no purpose whatever—that they were introduced merely to be absolutely disregarded. We ought, if we reasonably can do so, to find a subject to which they may attach. Now the solicitor for the grand jury had a well-recognised status. He was as well known as any official in the county, and transacted all the county business for the grand jury. The grand jury were statutably empowered to present moneys to be paid to him for county work of a civil character done by him. If then the solicitor to the grand jury was a person doing county business paid for out of county money, may it not be reasonably supposed that it was to him that the Legislature was applying the description, "county solicitor"? As a description of the individual it was quite as appropriate as solicitor to the grand jury. Solicitor to the grand jury was a well recognised description: able men have filled that position continuously for many years, and have been known and referred to by that title, not only whilst the grand jury was sitting, but in the intervals from Assizes to Assizes. My friend The Mac Dermot referred to the instance of Mr. Malachy Kelly in Mayo. He says that to his personal knowledge that gentleman has filled the position of solicitor to the grand jury for twenty-five years, a quarter of a century! I did not think myself that Mr. Kelly had filled the position for so long a time; but, alas, the shadows are sensibly lengthening upon the paths of most of us. We can readily, therefore, find a person to whom the description can reasonably be held to apply; and, rather than have recourse to the drastic operation of striking

Q. B. Div. 1899.

THE QUEEN v. WICKLOW CO. COUNCIL.

Sir P. O'Brien, L.C.J.

out the words as meaningless, we should give them the meaning they reasonably bear.

The Mac Dermot has argued that, inasmuch as the grand jury have only a statutory power to appoint officers, and as there is no statutory authority to appoint a solicitor, the words "county solicitor" can in no event be construed to mean the solicitor to the grand jury. But this argument is answered by the very words of the section. The term "county solicitor," appears in the section; and the section provides that, amongst other persons, a "county solicitor" shall be *deemed* to be an officer of the grand jury. Therefore, though a county solicitor or solicitor to the grand jury (by whichever name we call the individual) may not in fact be an officer of the grand jury appointed under statutory authority, yet by the very language of the 115th section of the Local Government Act he is to be *deemed* and must be dealt with as an official of that body, no matter what was the mode of his appointment.

We think, too, that, as to time, Mr. Brown was an "existing officer" within the definition contained in the 109th section of the Act. Having been appointed by the grand jury to transact the legal business of the county he was, for the time being, the only person to whom the expression "county solicitor" could reasonably apply. He filled this character on the last day of March, 1898, and on the 1st April, 1899. The great strength of Mr. Brown's position is this that, unless the words "county solicitor" apply to him as solicitor for the grand jury, there is no person in the county to whom they can possibly apply. These words could not mean "crown solicitor" for the county. The discharge of criminal business for the county was not transferred to the county council. The words could not mean "clerk of the crown," for that official discharges functions different from those of a solicitor, and when referred to in the statute he is given his appropriate title. We cannot wholly disregard the words of the enactment, and we ought not have recourse to what I have already styled the drastic operation of striking out those words, and thereby imputing ignorance, perfunctoriness, or even perversity to the Legislature, when there plainly exists a subject to which they may reasonably be held to apply. Mr. Maxwell's

argument, founded on the 118th section of the Act as to superannuation allowances, does not, we think, assist his position. It does not follow that, because some officers who are transferred to the county council would under certain circumstances be entitled to superannuation allowances, none but officers who would be so entitled have been transferred.

As to the argument pressed by The Mac Dermot that Mr. Brown has no *locus standi* in this Court—that his proper course would have been to apply to the Treasury—we do not think it well-founded. An appeal to the Treasury seems to me to be conversant with a case in which the applicant was *ex concessis* within the description contained in the Act of Parliament, but was for some reason denied compensation. It does not apply to a case in which the question is whether a particular individual is within the section at all, whether he has the *status* contemplated by the Act. On all grounds we think that Mr. Brown is entitled to succeed; that the writ must go; and that the County Council must pay the costs.

MURPHY and GIBSON, JJ., concurred.

MADDEN, J:—

It does not appear to have occurred to anyone but the draftsman of the Local Government Act to apply the words "county solicitor" to the solicitor employed on behalf of a county. But the phrase is an apt one. It is concise, intelligible, and absolutely free from ambiguity; for the ingenuity of counsel is unable to suggest anyone else to whom it could possibly apply.

The solicitor so employed is generally known as solicitor to the grand jury. But this is not his legal title, and if he had been so described in the statute, some of the arguments that have been addressed to us would have been employed to prove that there could have been no such person in existence at the passing of the Act. The grand jury had no corporate existence after they were discharged by the Judge of Assize. If there was no grand jury in existence in the county of Wicklow on the 1st of April, 1899, how (it would have been asked) could there be then in existence

Q. B. Div. 1899.

THE QUEEN v. WICKLOW CO. COUNCIL.

Madden, J.

the solicitor of that which did not itself exist? I do not say that the argument would have been more convincing, but it would have been more relevant, if the solicitor doing county work had been so described. I am quite prepared to accept the words "county surveyor" as "a good phrase"; and we know that "good phrases are surely and ever were very commendable."

I am equally clear that the solicitor so described was not a county officer, and that it required an Act of Parliament to place him in that position. But though not a county officer he was employed on behalf of the county under an engagement which practically continued during good behaviour, and he was paid out of the county rates under statutory authority. The applicant in the present case has been so employed for twelve years, and an instance was mentioned at the bar where the same solicitor acted for the same grand jury for upwards of a quarter of a century. Accordingly the Legislature thought it fair and reasonable to place a solicitor so employed in the same position as the secretary of the grand jury, who was dismissable at will, and a barony cess collector, who was appointed from assize to assize; and so the statute enacts that he shall be *deemed to be*, what he would not be in the absence of this express enactment, "an officer of the grand jury," for the purposes of the section, including, of course, the provisions imported from the English Act with regard to compensation.

Solicitors for applicant: *S. Gordon & Son.*
Solicitor for respondents: *A. G. Wailes.*

A. E. R. J.

CANAVAN *v.* BURTON (1).

(1898. No. 17,713.)

Q. B. Div.
1899.
Nov. 8, 9, 14.

Landlord and tenant—Landlord and Tenant (Ireland) Act, 1860 (23 & 24 *Vict. c.* 154) *sects.* 1, 41—*Lease—Implied covenant for title and quiet enjoyment—Land Law (Ireland) Act*, 1881 (44 & 45 *Vict. c.* 49), *sects.* 2, 5—"*Judicial tenancy*"—*Subletting without consent.*

Upon a subletting inoperative by reason of the absence of the landlord's consent, no covenant for title or quiet enjoyment can be implied under section 41 of the Landlord and Tenant (Ireland) Act, 1860.

NEW TRIAL MOTION, in an action brought by a tenant against his immediate landlord for damages for alleged breach of the covenant for title and quiet enjoyment, implied under section 41 of Deasy's Act, 1860. The action was tried before Kenny, J., and a common jury of the city of Dublin in June, 1899. The defendant was a "judicial tenant" of certain lands in county Wicklow, who by an agreement in writing, dated the 2nd November, 1897, had made a subletting of portion of these lands to the plaintiff for a term of five years. Upon discovering this the head landlord, who had not consented to the subletting, served a notice to quit upon the defendant; and thereupon the defendant obtained (on appeal) a civil bill decree in ejectment against the plaintiff, and caused the same to be executed through the sheriff. The defendant counterclaimed for waste and dilapidations. The jury assessed £20 damages in the plaintiff's favour, by reason of the eviction, and on the counterclaim, £10, in favour of the defendant, for destruction of fences, ploughing up of lands, and injury to the house and offices. The learned Judge, being of opinion that there was no "lease" within sect. 41 of Deasy's Act, 1860, directed a verdict for the defendant in the original action, and gave judgment for the defendant (Burton) on the counterclaim for £10, staying execution.

(1) Before PALLES, C.B., and MURPHY, GIBSON, and MADDEN, JJ.

Q. B. Div. 1899.

CANAVAN v. BURTON.

The plaintiff moved to change the verdict and judgment, on the ground, substantially, of misdirection.

Moloney, *Q.C.*, and *Rosenthal*, for the plaintiff.

Wakeley, *Q.C.*, and *H. Hunt*, for the defendant.

Cur. adv. vult.

Nov. 14.

PALLES, C. B. :—

The only question in this case is whether, upon a subletting by a document in writing, which subletting is inoperative by reason of the absence of consent on the landlord's part, there is implied, under section 41 of the Landlord and Tenant Act, 1860, a covenant for title and quiet enjoyment.

The question must turn upon the construction of that forty-first section, taken of course in connexion with the other sections of the Act. The forty-first section enacts :—

"Every lease of lands or tenements, made after the commencement of this Act, shall (unless otherwise expressly provided by such lease) imply an agreement on the part of the landlord making such lease, his heirs, executors, administrators, and assigns, with the tenant thereof for the time being, that the said landlord has good title to make such lease, and that the tenant shall have the quiet and peaceable enjoyment of the said lands or tenements without the interruption of the landlord or any person whomsoever during the term contracted for, so long as the tenant shall pay the rent and perform the agreements contained in the lease to be observed on the part of the tenant."

Now it is plain that, if the word *lease* in this section bore the signification that it had before the Act of 1860, then, in the case I have put, there could be no such implied covenant, because then the implication would have arisen from the fact of the estate having passed. At the common law, the covenant arose from the use of the word "demise" and there could be no covenant where nothing passed under that word. Further, I need not say that the long line of authorities (which we cannot question) from *Donoughmore* v. *Forrest* (1) to *O'Kane* v. *Burns* (2), beyond all doubt establishes

(1) Ir. R. 5 C. L. 443. (2) [1897] 2 Ir. R. 591.

that the lease or letting in the present case is inoperative and null.

It is, however, argued that the present case may be distinguished from that which I have put by reason of the definition of *lease* in sect. 1 of the Act of 1860:—

"The word 'lease' shall mean any instrument in writing, whether under seal or not, containing a contract of tenancy in respect of any lands in consideration of a rent or return."

It is said that, if you read into sect. 41 the definition of the word *lease*, it will read, "*every instrument in writing* containing a contract of tenancy, &c., shall imply the covenant in question"; and that in the present case there is such an "instrument in writing," and that there exists in fact the contract required, although that contract is inoperative to pass an estate. But the words of the definition must be read in connexion with the third section of the Act:—

"The relation of landlord and tenant shall be deemed to be founded on the express or implied contract of the parties, and not upon tenure or service, and a reversion shall not be necessary to such relation, which shall be deemed to subsist in all cases in which there shall be an agreement by one party to hold land from or under another in consideration of any rent."

Thus read, and if the words of the definition are taken strictly, it will be seen that the suggested argument cannot be sustained. The words are not, "in any instrument in writing, whether under seal or not," but "in any instrument in writing . . . *containing a contract of tenancy*"; and, if the instrument does not contain a contract of tenancy, then it is void. Then it is settled by the decisions to which I have referred that the instrument here does not contain any contract of tenancy. So far as it purports to be a contract of tenancy it is null and void.

In my opinion, to constitute a lease within the definition, it is not sufficient that the instrument should *purport* to create the relation of landlord and tenant, if in fact it is inoperative to do so. It must contain a contract—not mere inoperative words which work nothing, but a contract of tenancy, by which I understand a contract by which the tenancy is actually created.

I turn back now to sect. 41, to contrast the words there used

Q. B. Div. 1899.

CANAVAN v. BURTON.

Palles, C.B.

with the circumstances of the present case. The section implies an agreement by the landlord, and here there is no landlord; the agreement implied is with the tenant, and here there is no tenant. Further, the implied agreement is limited "*so long as* the tenant shall pay the rent and perform the agreements contained in the lease to be observed on the part of the tenant." Here there is no rent; there is no agreement to pay it; there are no agreements to be performed by the tenant, because all such agreements are null, as there is no lease in which they can be contained.

Upon these grounds, I am of opinion that, by reason of the letting being inoperative, there is no implied agreement for title or quiet enjoyment, upon which the action can be sustained.

I need not say that the reasoning I have adopted has no application to a case in which the reason that the estate does not pass is want of title in the lessor, as distinguished from the provisions of a statute. In the one case there might be an estoppel, which in the latter there cannot be. I also desire to guard myself against expressing any opinion in reference to an instrument in writing, containing an *express* covenant for title or quiet enjoyment. Upon such an agreement many considerations would arise, as to which I desire to reserve my opinion.

It is sufficient, as to *Fogarty* v. *Shanahan* (1) and *Doody* v. *Nolan* (2), to say that they have no application, as there the covenants were express. In the present case the agreement sued on is not *implied*, because the *substratum* necessary under the statute for the implication does not exist.

The judgment sought to be set aside must stand, and this motion be refused with costs.

MURPHY, J.:—I concur.

GIBSON, J.:—

The plaintiff knew that the defendant was judicial tenant; but there is no evidence that he was aware that the landlord had not consented, or that the proposed lease was invalid. The defendant was advised that the letting could be made. The landlord having

(1) [1896] 2 I. R. 273. (2) 2 L. R. Ir. 199.

subsequently declined to consent and served notice to quit, the defendant was obliged to recover possession from plaintiff by ejectment.

On this state of facts the question arises whether the lease implies an agreement as to good title on the part of the defendant as landlord under section 41 of Deasy's Act, notwithstanding that the lease was executed in violation of the express prohibition of the Act of 1881.

Suggestions of hardship were made on each side. On the one side, had the plaintiff seen fit to investigate title or inquire as to the landlord's consent, or demanded an express covenant for title, he would have been protected. On the other hand, the defendant was in the wrong in letting when he knew that his landlord had not consented, and the best sanction for enforcing the statutory prohibition is obtained by making the tenant who transgresses it answerable in damages; but I disregard all such considerations as irrelevant on the construction of a statute.

There was some preliminary discussion as to how the case would have stood if the lease had contained express covenants for title, and *Doody* v. *Nolan* (1) was referred to. That case was decided on demurrer. There was no averment that the plaintiff was in any way aware of the invalidity of the assignment. The majority of the Court held that a covenant to give up possession (which would have been implied from the very fact of the assignment without express words: *Jinks* v. *Edwards* (2), *Seddon* v. *Senate* (3)), could not be enforced on the ground that it was directly connected with and ancillary to the unlawful assignment. The Chief Justice expressed an opinion that an express covenant for title would have supported an action. His opinion seems limited to a covenant for title proper. It is not necessary here to decide the point; but I shall assume in favour of the plaintiff, as an innocent purchaser without notice, that such an agreement, if expressed in the present lease, would have been lawful and could have been sued on.

Express covenants are however very different from implied covenants. Thus an express limited covenant for quiet enjoyment

(1) 2 L. R. Ir. 199. (2) 11 Ex. 775. (3) 13 East, 63.

Q. B. Div. 1899.

CANAVAN v. BURTON.

Gibson, J.

excludes the implication of an absolute covenant for title: *Leonard* v. *Taylor* (1); though an express limited covenant would have no similar effect on an express absolute covenant: *Barton* v. *Fitzgerald* (2), *Howell* v. *Richards* (3), *Smith* v. *Compton* (4). Again, implication of title may be displaced by knowledge of the contracting party that legal title is impossible: *Re Gloag* (5). But, where the contract or deed contains an express engagement as to title, such knowledge is immaterial: *Cato* v. *Thompson* (6), *Page* v. *Midland Railway Company* (7).

Before we consider the effect of section 41 of Deasy's Act, it is well to recall what was the law on the subject of implied covenants at the time that Act was passed. This is peculiarly desirable as the statute was more or less in the nature of a code.

A covenant in law (now usually described as an implied covenant) was an agreement implied by law from the use of certain words having a known legal operation in the creation of an estate, *e.g.* "*demisi*"; so that after having had their primary operation in creating the estate, the law gave them a secondary force, by implying an agreement to protect and preserve the estate so by these words already created: *Williams* v. *Burrell* (8). Where, by reason of statutory prohibition, the demise was void and could create no estate, it seems certain that no implication could arise. Where the primary operation of the word 'demise' was destroyed, the secondary effect by implication necessarily fell with it.

Similarly, if oral lettings imply engagements binding the landlord (as was held in *Hall* v. *City of London Brewery Company* (9)) it would seem that such lettings, outside section 41, would come within the common law principle, and that where the letting was illegal or void, the implication would be excluded.

This brings me to the section itself. It no doubt enlarges the common law implication. Does it transform the whole nature and essence of that implication, changing it from an obligation inhering

(1) Ir. R. 8 C. L. 300.
(2) 15 East, 530.
(3) 11 East, 633.
(4) 3 B. & Ad. 189.
(5) 23 Ch. D. 320.
(6) 9 Q. B. D. 616.
(7) [1894] 1 Ch. 11.
(8) 1 C. B. 402.
(9) 2 B. & S. 737.

in a lawful demise into an independent agreement detached from any lawful demise?

If the subletting is prohibited by Parliament, it is illegal; and Best, J., says, in *Bensley* v. *Bignold* (1), that there is now no distinction between *mala prohibita* and *mala in se*. Apart from authority there would be perhaps much to be said for the view that the phraseology used in the subletting Acts and in the Act of 1860, only had the effect of invalidating the instrument. Such cases as *Payne* v. *Mayor of Brecon* (2), decided on the Municipal Corporations Act, which contains the words "it shall not be lawful," would support this view. Whiteside, C.J., however, in *Donoughmore* v. *Forrest* (3), appears to have thought that the Statute of 1860 contained an express prohibition making the instrument void on the ground of illegality. His reference to *Bartlett* v. *Vinor* (4), makes his meaning clear: Ball, C., in *Doody* v. *Nolan* (5) would seem to have been of the same opinion. From *Donoughmore* v. *Forrest* (3) to the present the expressions "illegal" and "illegality" are of constant occurrence in judgments. *Gillman* v. *Murphy* (6) and *O'Kane* v. *Burns* (7) are illustrations of this. Whatever be the effect of the Act of 1860, the language of the Act of 1881 is stronger, and more nearly resembles an express prohibition. It may, however, be that the term "illegality" is used in a secondary sense as meaning merely that the instrument is made inoperative by statute on the ground of public policy. The prescribed consent would make the transaction lawful, and the sub-tenant might be misled by a statement or engagement that the consent had been obtained. Such a subletting would not come within *Fisher* v. *Bridges* (8), as there would be no common illegal purpose.

Fogarty v. *Shanahan* (9) (where, however, the point was not pleaded or argued) is not unfairly relied upon as supporting the view that the effect of the legislation is merely to avoid the letting. In that case, the parties entered into the contract knowing

(1) 5 B. & Ald. 335, p. 341.
(2) 3 H. & N. 572.
(3) Ir. R. 5 C. L. 443, p. 470.
(4) Carth. 252.
(5) 2 L. R. Ir. p. 211.
(6) Ir. R. 6 C. L. 34.
(7) [1897] 2 I. R. p. 595.
(8) 3 E. & B. 642.
(9) [1896] 2 I. R. 273.

Q. B. Div. 1899.

CANAVAN v. BURTON.

Gibson, J.

that the statute was violated. Assuming, however, that the lease here was void without being illegal, how can the statute be construed as attaching an implied contract to an express contract to which it denies any validity? If the tree is killed, how can there be a living graft?

Section 41 clearly can only apply where a lease, a landlord, and a tenant, exist. There is here no lease containing any contract of tenancy. A void contract is not a contract. The physical signature of a piece of paper which is not a contract cannot give rise to contract rights. The plaintiff is not landlord, and cannot be bound by sect. 41, any more than the defendant, who is not tenant, can be bound by sect. 42. The definitions in the Act of 1860, however, it is argued, show that the statute is only dealing with instruments which *purport* to create the relation of landlord and tenant. I do not think so. The definitions of "lease," "landlord," and "tenant," import a valid contractual relation, and the terms are, throughout the various sections of the Act, used in that sense. A lease may not give a good title, but every valid lease binds the parties by contract. The statute prevents this lease from being a valid lease. The document pretends to be what it is not, and cannot be, namely a real lease. Strange results would follow if an inoperative lease implies a valid covenant for title. Thus, under the Municipal Corporations Act, 3 & 4 Vict. c. 106, section 140, would section 41 imply, in a lease made in defiance of section 140, a valid covenant for title, so as to make the lessors, and through them the ratepayers, liable in damages?

It is urged that section 41 is like the Conveyancing Act and similar enactments, such as the Lands Clauses Act, 1845, section 132, and that the implied agreements are to be dealt with as if expressed in the instrument. Those statutes were framed *alio intuitu*. The Act of 1860 was a codification of the existing law of landlord and tenant with certain modifications. Section 41, when it says "imply" means it. Even if the section declared that every lease should be deemed to include or express covenants for title, that would not assist the plaintiff, as there is no lease, no landlord, and no tenant.

It is suggested that the instrument, though for some purposes inoperative, must have some effect, as a forfeiture may result from

a deed made void under section 10: *Clifford* v. *Reilly* (1). The forfeiture, however, arises from the forbidden act, just as a tortious fine by a tenant for life worked a forfeiture, though the Statute 14 Eliz. c. 8, made such fine void: Leake, Digest of the Law of Property, vol. i., p. 58. So the crime of bigamy is committed, though the second marriage is necessarily void.

The fact that no one ever dreamt of attempting such an action before is some argument against the present ingenious venture. The action is unsustainable on common law principles, and the statute does not apply. The defendant is, therefore, entitled to judgment. Judgment on the counterclaim, which is based on illegal acts not covered by any consent, must stand.

MADDEN, J.:—

The plaintiff's case depends on the construction of the 41st section of the Landlord and Tenant Act of 1860; and, in order to understand the precise effect of that enactment, it is necessary to consider the state of the law when it was passed. The distinction between a warranty in deed, or (as it would be now called) express covenants for title, and a warranty in law, or implied covenants, is thus pointed out by Coke (Co. Lit. 384a):—"A warranty in deed, or an express warranty (whereof Littleton here speaketh) is created only by this word *warrantizo*, but warranties in law are created by many other words." And it was settled law that a lessor by the use of the word *demisi*, or an equivalent term, created a warranty in law, or implied covenants for quiet enjoyment, operative so long as the estate of the lessor enabled him to give effect to his warranty: (Sheppard's Touchstone, 165a). This warranty was incident to, and sprang out of the demise, which it presupposed as the cause of its existence.

In this state of the common law, several statutes were passed for the purpose of putting an end to a great public evil in Ireland —the minute subdivision of holdings, as the result of subletting without the authority of the head landlord. For a time, subletting by a tenant without the consent of his landlord, was prohibited irrespective of the terms of his tenancy. But by the 18th section

(1) I. R. 4 C. L. 218.

Q. B. Div. 1899.
CANAVAN v. BURTON.
Madden, J.

of the Act of 1860, the prohibition was confined to tenants under leases containing an agreement against subletting. As regards such a tenant it was enacted that it should not be lawful for him to sublet, without the express consent in writing of the landlord or of his agent, testified in the manner provided by the section. A prohibition in similar terms affecting judicial tenants is contained in the 5th section of the Land Act of 1881, under which the defendant holds; and this is the section which defines their rights.

The effect of a prohibition of this kind is clearly stated in the judgment of Lord Chancellor Ball in *Doody* v. *Nolan* (1). That case was decided on the 10th section of the Act of 1860, prohibiting assignments without consent, but it is applicable to the similar terms of prohibition contained in the earlier Subletting Acts, and in the section of the Act of 1881. He there points out that the assignment is declared to be unlawful. This, it will be observed, is a different thing from enacting that it should be inoperative:—"A distinction has been suggested between what is *malum in se*, and what is only prohibited by statute. The former, it is said, vitiates everything direct, consequent, or ancillary; the latter nothing beyond the direct act. But this does not seem to be so."

Applying those observations to the state of the law when the Act of 1860 was passed, and to the prohibitory clause which was then in force, it is, I think, clear beyond doubt that no implied covenant for title could be created by the use of the word *demise* in an instrument of subdemise which was declared by statute to be unlawful. This would, I think, have been the effect of the statutes if they had gone no further than declaring the subdemise to be void. For I cannot understand how an instrument which is absolutely null and void, not from any defect in the title of the lessor, but by an inherent invalidity, the result of a direct declaration of the Legislature, could operate to create any contract by way of implication. *Ex nihilo nil fit.* But when the attempted disposition is declared to be unlawful, other considerations arise. There is no difference in point of legality (as Lord Chancellor Ball points out) between *malum in se* and *malum prohibitum*, although in point

(1) 2 L. R. Ir. 199, 211.

of moral turpitude they may be widely different. The maxim, *ex turpi causa non oritur actio*, applies to the former. It seems to exclude the possibility of an implication *ex turpi causa*. That a similar principle is applicable to *malum prohibitum*, appears from the following observations of Holt, C.J.:—"Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute is a void contract (1)." *Doody* v. *Nolan* (2) decides that an express covenant which was ancillary to, and dependent on the unlawful contract was null and void. It is, it seems to me, *a fortiori*, that the unlawful contract cannot be the occasion of an implied covenant, springing out of the terms employed in the illegal instrument.

I now turn to the 41st section of the Act of 1860, passed in this state of the law. It can hardly be supposed that the Legislature intended to give any additional effect, whether by way of implication or otherwise, to the classes of subdemise which it again declared to be unlawful. If, however, such is the effect of the language which it has employed, it must be interpreted in its ordinary sense. The section enacts that every lease made after the commencement of the Act shall, unless otherwise expressly provided, imply an agreement, on the part of the landlord, such as the plaintiff in the present case seeks to enforce. A lease is defined by the 1st section to be an instrument in writing, containing a contract of tenancy in respect of any lands, in consideration of a rent or return. Counsel for the plaintiff rightly contend that the 41st section is to be read as if this definition were written into it. They then read the section as importing the implied covenants into every instrument in writing which contains on the face of it words purporting to create a contract of tenancy. Having thus included in the written instrument the covenants mentioned in the 41st section, they contend that the case must be dealt with as if the covenants constituted a warranty in deed, and not a warranty in law.

Now, I do not think it necessary to consider the effect of express covenants in an instrument of the kind. I will assume for the purposes of this case that they would constitute a valid cause

(1) Carth. 252. (2) 2 L. R. Ir. 199.

Q. B. Div. 1899.
CANAVAN v. BURTON.
Madden, J.

of action. But I cannot adopt the reasoning by which the plaintiff seeks to turn implied covenants into a warranty in deed. Such reasoning might be applicable to a clause in a statute like the Conveyancing Act, passed for the purpose of shortening legal documents. The purpose of such an enactment might be worked out by simply writing into a certain legal instrument the several covenants and clauses which are specified in the statute. But the Act of 1860 was passed for the purpose of regulating the relation of landlord and tenant, not for the purpose of simplifying conveyances. It is now sought to apply its provisions to a case where there is indeed an instrument in writing, but there is nothing else. There is no landlord, no tenant, no lease, no contract of tenancy; and the rent or return which is to constitute the consideration for the contract of tenancy has no existence. All these are not only swept away, but the attempt to create them is declared, for reasons of public policy, to be unlawful. In short, the plaintiff asks us to give operative effect to a nullity, and to evolve a covenant in law out of an unlawful act.

For these reasons I concur in the judgment of the Court.

A. E. R. J.

Appeal. 1900.
March 1, 2.

The plaintiff appealed to the Court of Appeal (LORD ASHBOURNE, C., WALKER, and HOLMES, L.JJ.), who, without calling on the respondent, affirmed the judgment of the Divisional Court.

Solicitor for plaintiff: *J. D. Rosenthal.*
Solicitors for defendant: *W. G. Bradley & Sons.*

R. D. M.

GUARDIANS ARMAGH UNION *v.* BELL (1).

Q. B. Div. 1899.

Nov. 15, 16, 30.

Appeal. 1900.

Jan. 24.

Locomotives Acts, 1861, 1865 (24 & 25 *Vict. c.* 70; 28 & 29 *Vict. c.* 83)—*Traction engine—Nuisance—Highway.*

The defendant was the owner of a steam traction-engine. Whilst being driven by the defendant's servants along the streets of K., it injured the water- and sewer-pipes of the plaintiffs (the urban sanitary authority) laid beneath the street. It was admitted that there was no negligence in the management of the machine, and that the engine was constructed in conformity with the Locomotives Acts, 1861 and 1865. It was, however, found as a fact that the plaintiffs' pipes were laid at a depth below the surface of the streets sufficient to protect them from injury by ordinary traffic, but not sufficient to protect them from injury by the defendant's traction-engine. The plaintiffs sued the defendant for damages in the County Court; and on case stated by the Judge of Assize:—

Held, that the defendant was liable upon the ground that a traction-engine being exceptionally calculated to inflict such damage, and injury having resulted from its use that would not have resulted from ordinary traffic, the defendant was liable in damages for such injury, and that the Locomotives Acts did not restrict his liability.

CASE STATED, under 27 & 28 Vict. c. 99, sect. 35, for the opinion of the Queen's Bench Division by the Lord Chief Baron, upon the hearing before him at the Armagh Summer Assizes, 1899, of a civil bill appeal from a dismissal on the merits by the County Court Judge. The case was to the following effect:—

The civil bill was brought by the plaintiffs, as the rural sanitary authority of the district, to recover £2 19*s.* 8*d.*, for damages alleged to have been done by the defendant's traction engine to a main water-pipe and to a sewer-pipe, the property of the plaintiffs, laid under two streets in the town of Keady, and for damages for negligence in the management of the said traction engine. It was admitted by the plaintiffs' counsel that the defendant's traction engine was constructed in compliance with the provisions of sect. 5 of the Locomotives Act, 1865 (28 & 29 Vict. c. 73), which adopts

(1) Before SIR P. O'BRIEN, L.C.J., and MURPHY, GIBSON, and MADDEN, JJ.

Q. B. Div. 1899. GUARDIANS, ARMAGH UNION v. BELL.

the limitations of weight and width of wheels contained in sect. 3 of the Locomotives Act, 1861 (24 & 25 Vict. c. 70). It was also admitted that the amount claimed was correct. The learned Lord Chief Baron found as a fact that the damage complained of was done by the defendant's traction engine; that the defendant was not guilty of negligence in the management of the traction engine; and that the plaintiffs' water-pipe and sewer-pipe were laid at a depth below the surface of the streets sufficient to protect them from injury by ordinary traffic, but not sufficient to protect them from injury by the defendant's traction engine. *Campbell, Q.C.*, for the plaintiffs, relied upon sect. 12 of the Locomotives Act, 1865, which provided that nothing therein contained should affect the right of any person to recover damages in respect of any injury he may have sustained in consequence of the use of a locomotive. *C. Murphy*, for the defendant, relied on sect. 5 of the same Act, authorizing the use on any public highway of any locomotive constructed in compliance with the requirements of the Act, and contended that the defendant was not liable for damage to drains and pipes laid at a depth below the surface insufficient to protect them from injury by traction engines constructed in compliance with the Act; he also contended that the word "person" in sect. 12 did not include a corporate body, and that the word "injury" in the same section did not refer to damage to property of the existence of which the defendant was necessarily unaware, but could only refer to damage caused by the negligent use or management of a locomotive. Upon the request of both parties the present case was stated upon the question whether upon the facts stated the defendant was liable to the plaintiffs for the damage done by his traction engine to their water-pipe and sewer-pipe.

Darison (*Campbell, Q.C.*, with him), for the plaintiffs.

C. Murphy and *Hume, Q.C.* (*Gordon, Q.C.*, with them), for the defendant.

[In addition to the authorities referred to in the judgments the following cases were cited during the argument:—*Eyerly's*

Case (1); *Watkins* v. *Reddin* (2); *Reg.* v. *Chittenden* (3); *Jeffrey* v. *St. Pancras Vestry* (4).]

Q. B. Div. 1899.

GUARDIANS, ARMAGH UNION v. BELL.

Nov. 30.

Cur. adv. vult.

SIR P. O'BRIEN, L. C. J.:—

This case is of considerable practical importance. The use of traction engines is becoming—indeed has become—very general, and it is important that the owners of these engines, and the general public, should be acquainted with the law in relation to them. There is a prevalent impression that if a traction engine is constructed pursuant to statutable requirements, and is in its progress preceded by flag and man in the prescribed way, then, in the absence of negligence by the owner or his servants, no liability attaches to such owner for damage resulting from the use of the engine. It is generally thought that compliance with statutable requirements, and the absence of negligence, afford a complete justification for all damage that may flow from the use of the engine. This is not so. Even though there be a complete compliance with statutable requirements and no negligence, yet still the owner of the traction engine is undoubtedly amenable to an action at law for damages if the use of the engine is fraught with danger, and if damage, which would not have been caused by ordinary traffic, results from its use.

The present case, in which we hold the defendant liable, clearly illustrates the proposition I have laid down. The facts of the case, which has been reserved for our consideration by my Lord Chief Baron, are as follows. The plaintiffs are the Rural Sanitary Authority for the Rural Sanitary District of the Armagh Union. The defendant was the owner of a traction engine plying between Keady and Armagh; and the plaintiffs sued the defendant to recover £2 19*s.* 8*d.*, being the amount of damage alleged to have been done by the defendant's traction engine to a main water-pipe and to a sewer-pipe, both the property of the plaintiffs, laid under two streets in the town of Keady. It was admitted that there was no negligence in the management of the engine. It was admitted also that the defendant's traction engine was

(1) 3 Salk. 183.
(2) 2 F. & F. 629.
(3) 15 Cox, C. C. 725.
(4) 63 L. J., M. C. 618.

Q. B. Div. 1899.

GUARDIANS, ARMAGH UNION v. BELL.

Sir P. O'Brien, L.C.J.

constructed in compliance with the statutable requirements, both as to weight and otherwise.

The Lord Chief Baron found as a fact that the damage complained of was done by the defendant's traction engine, and that there was no negligence; but in the seventh paragraph of the case he tells us that he found as a fact that the plaintiffs' water-pipe and sewer-pipe were laid at a depth below the surface of the streets sufficient to protect them from injury by ordinary traffic, but not sufficient to protect them from injury by the defendant's traction engine. I repeat and emphasize the words "sufficient to protect them from injury by ordinary traffic, but not sufficient to protect them from injury by the defendant's traction engine," for these words supply the test by which the case is to be decided.

If the traction engine is exceptionally calculated to inflict damage, and damage results from its use, which would not result from ordinary traffic, the owner is responsible in an action for a nuisance, which is wholly independent of negligence; and the Act of Parliament does not protect him, for the twelfth section of the Locomotives Act of 1865 provided that nothing therein contained shall affect the right of any person to recover damages in respect of any injury he may have sustained in consequence of the use of a locomotive, that is to say, the Act of Parliament which regulates the use of locomotives, by imposing penalties for the non-observance of prescribed conditions, is careful to preserve the rights of individuals in case injury results from their use. I should have myself desired that the finding of fact in the seventh paragraph of the case was somewhat more full; but I think two things are clear from the language of that paragraph, namely, that the traction engine was dangerous—dangerous in this sense, that it was more calculated to inflict injury than the ordinary means of traffic. I think this is clearly involved in the finding that the pipes were in a position sufficiently beneath the surface to protect them from any injury by ordinary traffic, but not sufficient to protect them from injury by the defendant's traction engine—that is to say, that the defendant's traction engine was abnormally effective in causing and inflicting damage to property. If this be so, it was, I think, plainly an engine, the use of which was dangerous to property.

Some of the cases which have been cited are interesting and useful.

I will refer, in the first instance, to *Powell* v. *Fall* (1). In that case the owner of a traction engine was sued for damage caused by sparks escaping from the engine and setting fire to a stack of hay of the plaintiff, which was burned. It was held that the owner of the traction engine was responsible in damages for the loss of the hay, and that this was so, though the engine was constructed pursuant to the provisions of the Locomotives Acts, and though neither the owner nor his servants were guilty of negligence. So Mr. Justice Mellor held, in a valuable judgment, which was affirmed by the Court of Appeal. Lord Justice Bramwell there said:—

"The Locomotive Acts are relied upon as affording a defence, but instead of helping the defendant, they show not only that an action would have been maintainable at common law, but also that the right to sue for any injury is carefully preserved. It is just and reasonable that, if a man uses a dangerous machine, he should pay for the damage which it occasioned."

Baggallay and Thesiger, L.JJ., concurred.

I think the case before us is quite within the authority of *Powell* v. *Fall* (1), because it necessarily, in my opinion, follows from the findings of the Lord Chief Baron that the traction engine in this case was a machine dangerous to property. In the one case a spark blew out laterally and produced damage, and in the present case the machine pressed down vertically on the high road with abnormal weight, and did damage which the ordinary traffic would not do. At common law this would be actionable as a nuisance, and the common law right is expressly preserved both by the 13th section of the Act of 1861 and the 12th section of the Act of 1865.

There are some observations in the judgments in the case of *Galer* v. *Rawson* (2) which may be referred to with advantage. In that case it appeared that the plaintiff was driving along a road in a dog-cart, when he met a traction-engine belonging to the defendants coming towards him. The traction engine was stopped, and the plaintiff's groom got down and led the horse

(1) 5 Q. B. D. 597. (2) 6 *The Times* Rep. p. 17.

Q. B. Div. 1899.

GUARDIANS, ARMAGH UNION v. BELL.

Sir P. O'Brien, L.C.J.

towards the engine. The horse became restive and bolted, dragging the groom along with it, and the dog-cart was upset, the plaintiff being injured. The Judge who tried the case, and the counsel who represented the parties, dealt with it as if liability depended upon the existence of negligence on the part of the defendant; but the Court of Appeal in the most emphatic way repudiated that view of the law. Lord Esher, M.R., is reported to have said that—

"As regards the law on the subject he himself had no doubt. If an engine of this sort fulfilled all the requirements of the statute, and yet was calculated to frighten horses of ordinary nerve and courage on a highway, the engine was a nuisance, and there was nothing in the statute to absolve the owner from liability to pay damages to those whose person or property was injured in consequence thereof . . . The case had been tried upon a question of negligence, and he could not understand how such a judgment upon the law came to be delivered."

Lord Justice Lindley observed, in the same case—

"The result of the sections was that any traction engine which was a nuisance and caused damage, would give rise to a cause of action, though all the statutory requirements were complied with. That was the law, though it was not generally known to the public."

Lord Justice Lopes gave judgment to the like effect—

"That, by the statutes, the right of action was preserved in all cases where the traction engine was a nuisance at common law, though all the statutory requirements were complied with, and though there was no negligence of any kind." "If" [added the learned Lord Justice], "the jury had found that the traction engine was a nuisance, in other words, that it was calculated to frighten horses of ordinary nerve and courage—the case would have been within *Powell* v. *Fall* (1)."

It is well to draw attention to the words of Lord Justice Lopes, that the traction engine would have been a nuisance "if it was calculated to frighten horses of ordinary nerve and courage." The owners of traction engines cannot take this statement of the law by Lord Justice Lopes too much to heart. A great many of them, I am confident, are wholly unconscious of their responsibilities, and it is well that the public should be thoroughly apprised of their legal rights.

(1) 5 Q. B. D. 597.

I have referred to the cases of *Powell* v. *Fall* (1) and *Galer* v. *Rawson* (2). I now turn to the case of the *Gas Light and Coke Company* v. *The Vestry of St. Mary Abbott's* (3), which, perhaps, of all cases is most directly in point. In that case it appeared that the plaintiffs, a gas company, laid down pipes under the surface of certain streets, as they were bound by statute to do, for the purpose of supplying gas to light the streets. The streets were vested in the defendants, the vestry of the parish by certain statutes which gave them the authority of the surveyor of highways, and with the duty to repair, but without prescribing any particular mode of repair. The defendants used steam rollers for repair of the streets, as being a mode of repair most advantageous to the ratepayers and the public; but the rollers used were so heavy as to frequently injure the plaintiffs' pipes, though the pipes were sufficiently below the surface as not to have been injured by the ordinary mode of repair if such rollers had not been used. In this state of facts it was held by the Court of Appeal in England that the plaintiffs were entitled not only to recover damages for the injury which had been done, but also to have an injunction to restrain the defendants from using steam-rollers in such a way as to injure the pipes of the plaintiffs. Now, this case is most material in its bearing upon the one before us.

Lord Justice Lindley in delivering the unanimous judgment of the Court, said:—

"The authorities to which he (Mr. Justice Field) referred, and particularly the *Metropolitan Asylum District Board* v. *Hill* (4), show that an action lies for an injury to property, unless such injury is expressly authorised by statute, and is, physically speaking, the necessary consequence of what is so authorised . . . But unless some such statutory enactment can be shown to authorise the defendants to injure the plaintiffs' pipes, the plaintiffs are entitled to redress. In this case there is no such statute, and it is unnecessary to say more."

Such is the language of Lord Justice Lindley in the case which I have cited. His *ratio decidendi* has an *a fortiori* application to this case, for not only is there no statute which expressly authorises the injury, but the 12th section of the Locomotives Act of 1865

(1) 5 Q. B. D. 597.
(2) 6 *The Times* Rep. 17.
(3) 15 Q. B. D. 1.
(4) 6 App. Cas. 193.

Q. B. Div. 1899.

GUARDIANS, ARMAGH UNION v. BELL.

expressly provides that nothing therein contained shall affect the right of any person to recover damages in respect of any injury he may have sustained in consequence of the use of a locomotive.

In this connexion, I may refer to the judgment of Mellor, J., in *Powell* v. *Fall* (1). He said:—

Sir P. O'Brien, L.C.J.

"In the present case the defendant brought along the public highway a locomotive propelled by steam generated by fire, and, although that act might be justified by the provisions of the Locomotive Statutes, yet the authority conferred by the statutes to use locomotives on public highways is not an unqualified authority, as was the case in *Vaughan* v. *Taff Railway Company* (2), and in *Rex* v. *Pease* (3), but is a qualified authority only, and does not extend to protect the defendant from liability to damages in respect of any injury he may have occasioned in consequence of the use by him of a locomotive engine on the highways. *Jones* v. *Festiniog Railway Company* (4) is entirely in point, and, in my opinion, governs the present case. In that case, as in this, an action had been brought by the plaintiff to recover damages by reason of a haystack having been fired by sparks from a locomotive engine. There, as here, the defendants contended that the statute under which they worked and used their locomotive, prevented any liability for damage occasioned by such working and use; but the Court held, distinguishing it from *Rex* v. *Pease* (3), and *Vaughan* v. *Taff Railway Company* (2), that the act authorising the making and use of the railway in that case did not exempt them from liability to make good the damage done to the plaintiff by an accidental fire occurring in the use of a locomotive engine without negligence. Now, in the cases under consideration, the right to recover for damages is expressly reserved to a person sustaining injury from the use of locomotive engines authorised by those statutes. It is, therefore, a stronger case than that of *Jones* v. *Festiniog Railway Company* (4)."

Mr. Hume, in his ingenious argument, contended that the plaintiffs brought their pipes into a position of danger—that, after the Locomotives Acts were passed, which permitted a certain weight, the plaintiffs, as it were, sought the danger, and must accept the risk. This contention is, in our opinion, wholly unsustainable. The plaintiffs were entitled to lay their pipes under the road on the assumption that nothing but the ordinary traffic would pass along that road. They were not bound to regulate their action by the fact that it was possible that a traction engine of the description before us might at some time, or at some intervals,

(1) 5 Q. B. D. 597.
(2) 5 H. & N. 679; 29 L. J. (Ex.) 247.
(3) 4 B & Ad. 30.
(4) L. R. 7 Q. B. 733.

pass along the road. They were bound to provide only against the effects of ordinary traffic, and they were not bound to assume or to act on the supposition, that an engine, which was in legal contemplation a nuisance, as its use was fraught with danger to property, would be brought along the road. To regulate one's action not merely with a view to ordinary traffic, but with a view to the possible action of wrong-doers would, in my opinion, only operate as an encouragement and licence to wrong-doing. In fact it would amount to the subordination of the exercise of legal rights to the commission of wrong. It would be a strong proposition to contend, if a culvert was not made with a view to resist the greater weight of a traction engine, though sufficient to resist all ordinary traffic, and if damage was occasioned to the culvert by the frequent passing of traction engines, that the neighbouring farmer whose crops were injured by injury to the culvert, should not maintain an action. If no action in such a case would lie, then every person who lawfully made a cellar, or repository of any sort beneath the roadway where a traction engine might at some time pass, should, in their construction of them, make special provision against the abnormal and injurious effect of such engines. There is, in my opinion, no such obligation on the public. It is clear that the plaintiff is entitled to a decree.

MURPHY, J. :—

I have only to say that I concur fully in the judgment that has just been given, and that an opposite conclusion could, in my opinion, only be arrived at by a total disregard of section 12 of the Act of 1865.

GIBSON, J. :—

There are two questions in this case. The first is, do the facts disclose actionable liability at common law for the damage done to the plaintiffs' pipes? The highway was for the purpose of surface use by ordinary traffic: *Mayor of Tunbridge* v. *Baird* (1); and a person using the highway owed a duty to persons owning or lawfully using the subsoil or substructures not to injure them

(1) [1896] A. C. 434.

Q. B. Div. 1899.

GUARDIANS, ARMAGH UNION v. BELL.

Gibson, J.

by imposing on the highway excessive weights not warranted by the reasonable and ordinary course of traffic.

For breach of this duty an action of nuisance would lie. The *Gas Light and Coke Co.* v. *Vestry of St. Mary Abbott's, Kensington* (1), is a decisive authority as to this.

The second question is, does the legislation protect the defendant from what would have been his common-law liability? The object was to regulate the use of locomotives. Section 5 of the Act of 1865 authorised the use of the defendant's locomotive; and, if that section stood alone, the plaintiffs would have had no legal ground of complaint, as the defendant's act would have had statutory justification. The permission, however, given by sect. 5 is expressly "subject to the provisions of this Act"; and section 12 preserves the right of any person to recover damages in respect of any injury sustained in consequence of the use of a locomotive. This provision applies plainly to the case of an authorised locomotive. It cannot be restricted to injury resulting from negligence. That would deprive the section of all independent operation or meaning, as negligence would have been a cause of action in any case. I agree with Mr. Hume that the section does not create a new cause of action founded on mere damage; but it preserved any common law right of action, and, in substance, subjects the use of authorised locomotives to all previous common law liabilities. This is the view taken in *Powell* v. *Fall* (2), and it is clearly right. If the damage done to the plaintiffs' pipes would have been an actionable wrong before the statute, the statute leaves the wrong unjustified and the remedy unaffected.

It is suggested that it must be taken that the pipes were laid after 1878, the date of the Public Health Act, and that they were placed with knowledge of possible antecedent rights under the statute of 1865. The argument assumes that the Act of 1865 gave, not qualified, but absolute rights. The plaintiffs were entitled to lay the pipes as, and when, they did; and, when the defendant saw fit to use his locomotive years after, he was guilty of nuisance in injuring the pipes, just as he would have been guilty

(1) 15 Q. B. D. p. 1. (2) 5 Q. B. D. 597.

of nuisance had the sparks from the engine set fire to hay stacked near the road, after the Act of 1865. The rights of the community cannot be regarded as suspended or defeated by reason of the Act of 1865 authorising the use of locomotives subject to liability to compensation for injury.

The dismiss was wrong, and ought to be reversed.

MADDEN, J.:—

The respective rights of the public, and of the owners of the soil, as regards a common highway, have been clearly defined ever since the decision in the leading case of *Dovaston* v. *Payne* (1). At common law, the public are entitled to an easement, and this right, like every other right, must be exercised with due regard to the rights of others, including of course, all persons interested in the soil adjacent to, or underlying, the highway. For many years after this decision, a locomotive propelled otherwise than by animal power was unknown. But the principles of the common law are clearly applicable to locomotives of all kinds, however propelled. Their use upon a public highway was lawful. But they could not be constructed or used so as to cause a public or a private nuisance.

The adaptation of the steam-engine to locomotive purposes led to the invention and use on public highways of a class of locomotives, not unlawful in themselves, but obviously more likely to create a nuisance, public or private, than the old fashioned waggon or carriage. Accordingly the Legislature intervened, and passed in 1861 and 1865 the statutes upon which the defendant relies.

It would be impossible for him to justify at common law the destruction of the plaintiffs' water-pipes. It is found in the case that the plaintiffs' pipes were laid at a depth sufficient to protect them from injury by ordinary traffic, but not sufficient to protect them from injury by the defendant's traction engine. The precise time at which they were so laid seems to be immaterial. They were lawfully placed in the soil of the highway, and it lay on the defendant to prove his title to something different from his common law right to use the highway for the purpose of ordinary traffic.

(1) 2 H. Bl. 527; 3 R. R. 497.

Q. B. Div. 1899.

GUARDIANS, ARMAGH UNION v. BELL.

Madden, J.

Turning to the statutes on which the defendant relies, I find that they are expressed to be passed for the purpose of "regulating the use of locomotives on turnpike and other roads." A scale of tolls is prescribed in order to prevent the anomalies and injustice recited in the Act of 1861. The tyres of the wheels must bear a certain relation to the weight of the machine, obviously in order to protect the surface of the road. Precautions are taken for the protection of the public, by prescribing the number of persons in charge of the machine and by directing the use of a red flag. It would be a strange result of this legislation if it were to have the effect of exempting from their common law liability owners of locomotives which it recognizes as specially dangerous. But we are not left to speculate on this point, for each of the statutes concludes with a clause preserving in express terms the rights of the public, and of any individual who may sustain injury in consequence of the use of a locomotive.

The fallacy in the defendant's argument consists of the use of the word "authorised" in two different senses. The weight of the engine employed by him is authorised by the 5th section of the Act of 1865, in the sense of its being consistent with the limitations and regulations imposed by that statute. But the use of an engine of that weight is not authorised in such a place or in such a manner as to become the cause of public nuisance or private injury. The distinction between a statute giving permissive power, and one conferring express power to do a certain definite thing involving certain consequences, is clearly pointed out in the judgment of Lord Watson in the *Metropolitan Asylum District* v. *Hill* (1). In the latter instance the Legislature has authorised and legalized not only the express thing, but all its necessary consequences, and if a member of the public suffers, it is a case of *damnum absque injuria*. But the statutory authorisation of a locomotive of a certain weight simply entitles the owner to use it on the public highway, subject to the common law liabilities expressly recognised and preserved by the Acts.

The present case seems to be undistinguishable from *Powell* v. *Fall* (2), where the traction engine was, as here, of a kind

(1) 6 App. Cas. 193. (2) 5 Q. B. D. 597.

authorised by the Locomotive Acts. The damage done to the plaintiffs' pipes would have been *injuria* before the Locomotive Acts. The defendant is authorised by the statute to use his traction engine, not absolutely, but with these important qualifications, that he uses it at his peril, and that any user of the highway, which before the passing of the Act was unlawful, and gave rise to a right of action at common law, is not authorised by the Act so as to relieve from any obligation or liability existing at common law.

A. E. R. J.

Appeal. 1900. Jan. 24.

The defendant appealed to the Court of Appeal (LORD ASHBOURNE, C., and FITZGIBBON and HOLMES, L.JJ.).

Gordon, Q.C., and *C. Murphy*, for the appellant.

Campbell, Q.C., and *Davison*, for the respondents.

THE COURT affirmed the decision of the Queen's Bench Division.

Solicitors for the plaintiffs: *J. Peel & Son.*
Solicitors for the defendant: *Carson & M'Dowell.*

G. Y. D.

Q. B. Div. 1899. Nov. 27.

In re ENNIS ELECTION PETITION.

O'LOUGHLIN and OTHERS, Petitioners; SCANLAN, Respondent (1).

Local Government (Ireland) Act, 1898—Election petition—Returning officer—Costs.

Where a municipal election petition is dismissed with costs, if the money lodged in Court as security for costs be not more than sufficient to discharge the respondent's costs, the returning officer is not entitled to be paid any part of his costs and expenses, incurred under the Local Government Act, 1898, out of that fund, but must look to the petitioners for payment.

Motion on behalf of the returning officer, that out of the money lodged in Court by the petitioners, £50, provision should be made for his expenses as such officer.

The petition had been filed, on the 1st May, 1899, by four county council electors against the respondent, who in April, 1899, had been elected a county councillor for the division of Ennis in the county of Clare. The petitioners, in the first instance, had, as required, lodged £50 in Court as security for costs; but this amount appeared to the Court to be insufficient, and, on the respondent's application, an order was made that the security should be increased to £100. The petitioners did not lodge the further sum, but applied to and obtained from the Court an order that they might be at liberty to withdraw their petition. Permission was granted, leave being reserved to any other qualified persons to apply to substitute their names in the place of the original petitioners. No further steps being taken, the petition was subsequently dismissed with costs against the petitioners. The petitioners were admittedly not in a position to pay anybody anything.

(1) Before Sir P. O'Brien, L.C.J., Palles, C.B., and Murphy and Gibson, JJ.

The respondent's costs were taxed at a sum far above £50. The returning officer's bill (which was not included in the respondent's costs) amounted to £32 1*s.* 6*d.*, which was made up of advertisements, £25 18*s.* 6*d.*, bill-posting, £3, and his own fee, £3 3*s.*

W. F. Kenny, for the returning officer, now moved that he be paid these costs and expenses out of the moneys lodged in Court, in priority to the respondent, or *pari passu* with him. He relied on what had been done in the Abbeymahon petition (28 June, 1899), and other recent election petitions under the Local Government (Ireland) Act, and on Rules 1 and 12 of the Order in Council of 12th February, 1899, relating to election petitions, made pursuant to the Local Government Board (Ireland) Act, 1898. It would be extremely inequitable if the returning officer, who, as an officer of this Court, was bound to do these acts, under the express direction of the Master of the Court, was not paid in preference to the respondent's claim, and was left to be recouped his outlay by persons who admittedly were no mark, and who for that reason had been put forward by others as the nominal petitioners.

Healy, Q.C., and *P. Lynch*, for the respondent, were not called upon.

SIR P. O'BRIEN, L.C.J. :—

We do not think it necessary in this case to call upon Mr. Healy or Mr. Lynch. We think the opinion formed by my brother Gibson and myself, on the previous occasion when this motion was at hearing, was right. I was anxious, however, that the Court should be fully constituted, as the case is undoubtedly one of some importance, and no authority can be found which bears upon it. Mr. Kenny has said everything that it is possible to say upon the matter. He insists that the returning officer is entitled to be paid his costs out of the money lodged in Court; but it is only necessary to refer to two matters to show that there is nothing in this contention—sect. 89 of the Municipal Corporations Act, 1882, and the 12th Rule of the

Q. B. Div. 1899.

In re ENNIS ELECTION PETITION.

Sir P. O'Brien, L.C.J.

Order in Council of 12th February, 1899. Indeed sect. 89 disposes altogether of the matter.

Section 89 (sub-sect. 1) provides that:—"At the time of presenting an election petition, or within three days afterwards the petitioner shall give security for all costs, charges and expenses, which may become payable by him to any witness summoned on his behalf, or to any respondent." (Sub-sect 2) "The security shall be to such amount not exceeding [£50 (1)], as the High Court or a Judge thereof on summons directs."

£50 was paid into Court as security for the respondent's costs. Mr. Kenny suggests that this amount, or part of it, can be reached under the 12th Rule of the Order governing election petitions in Ireland. But that Rule only provides that the costs of the publication of any matters required to be published by the returning officer, "shall be paid by the petitioner or person moving in the matter, and shall form part of the general costs of the petition." That cannot over-ride the provisions of sect. 89, which declares that the money lodged in Court shall be appropriated to "the costs, charges, and expenses" which may become payable by the petitioner, "to any witness summoned on his behalf, or to any respondent."

Mr. Kenny refers us to the provision that the Court shall have power to decide upon all equitable claims and so-forth (2); but it would strike me as a very peculiar and manifestly erroneous exercise of that jurisdiction by us if we were to say that upon any ground of equity we should allocate some of this fund, which is appropriated by the Act of Parliament to the costs of the respondent, to meet the claims of the returning officer, a very masterful equity indeed. There would be no warrant for such a drastic operation.

Section 89 deals with the purposes for which the security is to be given. Those purposes could not have been, and have not in fact been, extended by any of the Rules. The payment of the expenses of the returning officer is not one of those purposes; and it is impossible, therefore, for us to grant this application.

(1) As amended by County, &c., Councillors (Ireland) (No. 2) First Elections Order, 1899.

(2) Election Petition Rules of 1899, Rule 18.

My own view, however, is that it would be well that some general order should be made dealing with this omission. I understand that these rules are identical with those in force in England; but I think that, nevertheless, it would be a salutary rule that a petitioner should deposit in Court some small sum of money as security for the returning officer's expenses. I cannot, however, think that it was necessary under the Act of Parliament that these very large sums should have been paid for publication of the petition, &c.

The amount which, as a minimum, has to be lodged in Court as security for the respondent's costs, £50, is, in my opinion, an absolutely insufficient sum in every case. It has been more than absorbed in the present instance by the costs of the respondent. Had a balance been left after satisfying his costs, the question before us would have been a different one.

PALLES, C.B., MURPHY, and GIBSON, JJ., concurred.

GIBSON, J., pointed out that the election petition cases to which counsel had referred in the argument appeared, upon an examination of the Court books, to be all cases in which the petitioner's costs and those of the returning officer were alone involved—no question arising as to the costs of the respondent.

Motion refused with costs.

Solicitor for the applicant: *F. G. Kerin.*
Solicitor for the respondent: *C. Miniken.*

A. E. R. J.

Q. B. Div. 1899. Dec. 18.

REG. (ROGERS) *v.* THE JUSTICES OF COUNTY ANTRIM (1).

Licensing Law—Notice of intention to apply for Justices' certificate for excise licence—Description of premises—3 & 4 *Wm.* 4, *c.* 68.

The Licensing (Ireland) Act, 1833, provides that an applicant for an excise licence certificate must serve a twenty-one days' notice in writing of his intention to apply, therein setting forth the situation and place of the house . . . specifying "the town, townland, parish, barony, half barony, and if in a city or town, the street, square, lane, or other description of place. . ."

R. served notice of his intention to apply in respect of "his house in Waring-street, Harryville, in the town of Ballymena" (stating also the parish, barony, and county). The application to Quarter Sessions was refused on the ground that the name of the "townland" was not given:—

Held, that the description was sufficient, and that *mandamus* should issue to the Justices to hear the application.

MANDAMUS.

The present applicant had, on the 2nd November, 1899, applied, at the annual licensing Quarter Sessions, held at Ballymena, in the county of Antrim, for a seven day licence for the sale of spirits by retail in his house "situate in Waring-street, Harryville, in the town of Ballymena," stating also the parish, barony, and county. Counsel for an opposing parishioner objected that the notice was insufficient, inasmuch as it did not set forth the *townland* in which the house was situate: and the application was dismissed on this ground. The house was admittedly within the town of Ballymena; and the applicant, in his affidavit grounding the application for the conditional order, stated that he did not know the name of the townland upon which his house stood, and that he believed the public generally to be equally ignorant. There were no numbers on the houses in Waring-street. The solicitor for the objector, in an affidavit as cause, stated that he

(1) Before PALLES, C.B., and JOHNSON, GIBSON, and KENNY, JJ.

believed it to be "fairly well-known to the public who are acquainted with the locality" that the house was situate in the townland of Ballykeel, the township consisting of parts of some six townlands; and he deposed that, if the townland had been stated, it would have given a more explicit and definite description of its location. This last statement the applicant denied.

Section 2 of the Act 3 & 4 Wm. 4, c. 68, provides that the twenty-one days' notice of intention to apply to Quarter Sessions for an excise licence certificate shall be—

"A notice in writing, signed by such person, stating the intention of such person to make such application, and setting forth the situation and place of such house, as well in respect to the road or highway on or adjacent to which it lies, or otherwise, in a true and particular manner, specifying the town, *townland*, parish, barony, half barony, and if in a city or town, the street, square, lane, or other description of place, together with the number of such house, if such house shall have been numbered, and also the place of abode of such person and the names and places of abode of the persons whom such person requiring such licence proposes as surety,"

R. F. Todd, for the applicant, contended that the description in the notice was sufficient (1).

R. R. M'Cutcheon, for the respondent (the objector below), argued that the name of the townland should have been stated. He also objected that the notice was bad, in that it did not give the number of the house in the street, and in that the applicant's place of abode was not expressly or correctly given, as it should have been: *Reg.* (*Gilbey*) v. *Justices of Fermanagh* (2). The Court, however, declined to entertain any save the one ground of objection taken below, that the "townland" was not named.

PALLES, C.B. [having read the section, continued]:—

The words that are the subject-matter of the dispute in this case are not in our opinion mandatory, but are applicable only in the particular cases in which they are appropriate to the matter in hand; and the mention of "barony, half barony,"

(1) See *Reg.* v. *Justices of Staffordshire*; 8 *Times* L. R. 226; 66 L. T. 371.
(2) [1897] 2 I. R. 559.

Q. B. Div. 1899.

THE QUEEN v. JUSTICES OF ANTRIM.

Palles, C.B.

both of which cannot at the same time apply to the same subject-matter, bears out this view, "or" not being used between them. The same remark applies to the use of the terms, "town, townland." It would seem, therefore, that only such of these descriptions need be filled up as may be applicable to the particular case, and that the "townland" need not of necessity be specified except in cases where that description would be appropriate. Though, in one view, this is really a question of fact, still, in my opinion, the Court, as in *Reg.* (*Gilbey*) v. *Justices of Fermanagh* (1), should not decline to interfere. The same observation governs the question of residence if it were open. I think that the description of the applicant as of this particular place is sufficient to describe his residence in compliance with the section. This, no doubt, is also a matter of fact: but it does not appear to have been decided by the magistrates one way or the other, and therefore, although I am extremely unwilling to interfere with decisions upon questions of fact, I think that the cause shown should be disallowed, and the order for a *mandamus* made absolute.

Solicitors for the applicant: *J. & A. Caruth.*
Solicitor for the respondent: *J. A. Steele.*

A. E. R. J.

(1) [1897] 2 I. R. 559.

FITZGERALD, APPELLANT; HOSFORD, RESPONDENT (1). *Q. B. Div.* 1899.

Fisheries (Ireland) Acts, 1842, 1863 (*5 & 6 Vict. c.* 106 *s.* 40; *26 & 27 Vict. c.* 114, *s.* 20)—*Weekly close time—Master and servant.* Nov. 27. Dec. 19.

The occupier of a salmon weir is under a continuous obligation to keep his weir open for the free passage of fish throughout the weekly close time, and cannot, by delegating the performance of this duty to a servant, escape responsibility.

Hosford v. *Mackey* ([1897] 2 Ir. R. 292) distinguished.

CASE STATED, by the Justices of county Limerick, sitting at Glin Petty Sessions, for the opinion of the Court, pursuant to 20 & 21 Vict. c. 43.

The appellant was summoned as "occupier or user of a stake net or stake weir" at Long Rock Weir in the River Shannon, for that he, during the weekly close season—Sunday, 14th May, 1899—did not "keep a clear opening in the chambers or doors of said stake net or weir" of the width, &c., as prescribed by 5 & 6 Vict. c. 106, sect. 40, and 26 & 27 Vict. c. 114, sect. 20, and the Acts incorporated therewith. The Justices assembled convicted the appellant "of the offence mentioned in the complaint, that is to say, that on the 14th day of May, 1899, at Long Rock Weir in the River Shannon . . . said date being during the weekly close season for salmon and trout, the defendant as occupier or user of a stake net or stake weir, known and situate as aforesaid, did not," during the hours of the weekly close season (13th to 15th of May, 1899), "keep a clear opening in the chambers or doors of said stake net or stake weir," of, &c., "as required by" 5 & 6 Vict. c. 106, sect. 40, and 26 & 27 Vict. c. 114, sect. 20, "and the other Acts incorporated therewith" and the Justices imposed a fine of £10 and £4 costs.

The evidence for the complainant was to the effect that the District Inspector of Fisheries, on Sunday, the 14th May, 1899,

(1) Before SIR PETER O'BRIEN, L.C.J., and MURPHY and GIBSON, JJ.

Q. B. Div. 1899.

FitzGerald, *Appellant*; Hosford, *Respondent*.

saw the weir being fished by men he could not identify, saw the doors of the pockets of the weir being opened by these men, and traced them to the house of Thomas Healy, the defendant's foreman. It was admitted that the defendant was the occupier or user of the stake net or weir in question. Thomas Healy, defendant's foreman, in charge of the weir, was examined, and deposed that he had been instructed and directed by the defendant to open all the doors of the weir during the weekly close times throughout the season. (An objection to this evidence was over-ruled by the Justices.) He stated that on Saturday morning, the 13th May, he had "opened" all the pockets in the weir, had seen them open at low water at noon on Saturday, and on Sunday the 14th, and had found them all open at 6 a.m. on the Monday following. This witness admitted that he was concealed in his house (which overlooked the weir) when the inspector came searching for the men seen by him in the act of fishing, and afterwards opening, the weir; that he did not come out; and he could give no explanation why he did not come out and speak to the inspector. For the complainant at Petty Sessions, it was urged that the occupier or user of the weir was liable, upon proof that a free passage for fish was not made or kept in accordance with the statute; and for the defendant it was contended that the defendant could not be held liable for the alleged illegal acts of the foreman committed contrary to his directions. The Justices found as facts:—"1, that a clear opening," in one of the chambers of said stake net or weir, as prescribed, "had not been kept upon Sunday, the 14th May, 1899; 2, that the defendant had given instructions to said Thomas Healy to keep such opening in said chamber; 3, that the chamber had been opened (? closed) by or with the privity of said Thomas Healy; 4, That the said Thomas Healy was the person who was in charge of said weir on behalf of the defendant."

Upon these findings, the Justices, being of opinion "that the case came within the operation of the said statutes under which the prosecution was brought, and that the defendant was liable," gave judgment against the defendant accordingly; and now, on the defendant's request, stated this case for the opinion of the

Court as to whether they, the Justices, were correct in point of law—"(*a*) in admitting evidence as to the defendant's instructions to his man T. Healy; and (*b*) in convicting defendant on the findings of fact above stated"; and as to what should be done in the premises.

E. Phelps (with him *Redmond Barry, Q.C.*), for the appellant:—

The effect of the evidence before the Justices was that the weir was properly "opened," so as not any longer to be in a fishing condition on Saturday, the 13th May; and that on the next day, Sunday, the alleged fishing was done by the appellant's employee, Healy, contrary to the appellant's express direction. The statutory duty of the appellant (under 5 & 6 Vict. c. 106, sect. 40, and 13 & 14 Vict. c. 88, sect. 46) was an absolute one to *open* the weir, *i. e.* to put it out of fishing order; but, we submit, once he has done this he cannot be held liable for the acts of a stranger, a trespasser, or enemy, who maliciously closes the weir and puts it in fishing order with a view to his harm, or for the acts of his servants, not done for the master's benefit, or within the scope of the servant's authority, but (as is proved here) contrary to the master's express directions. Upon this, the recent decision of this Court in *Hosford* v. *Mackey* (1) is, we submit, an authority directly in point, where licensing cases such as *Commissioners of Police* v. *Cartman* (2), and cases of nuisance, such as *Reg.* v. *Stephens* (3), are distinguished. Where a nominal penalty may be inflicted, as in licensing and nuisance cases, there may be little objection to holding that *mens rea* need not be proved, and that an employer may technically be liable for the misconduct of others; here, however, if liable at all, he is subjected to the substantial minimum penalty of £10. Further, in licensing cases (such as *Cartman's Case* (2)) the penalty can *only* be awarded against the licensee, not against the actual wrongdoer; while here there can be no doubt that the servant is personally responsible at law for his offence.

(1) [1897] 2 I. R. 292. (2) [1896] 1 Q. B. 655.
(3) L. R. 1 Q. B. 702.

Q. B. Div. 1899.

FitzGerald, *Appellant*; Hosford, *Respondent*.

Conner, Q.C. (*H. C. Cullinan*, with him), for the respondent:—*Hosford* v. *Mackey* (1) was a decision upon a totally different section. Under the enactments here in question, the owner or occupier of the weir (here the appellant) is under an absolute obligation not only to "open" but to "keep open" the weir during the weekly close season; nor can he, by any delegation of that duty, escape the liability thus imposed on him. To hold otherwise would be to render useless the provisions of the statute; for it would be easy to set up the defence that the owner had employed a negligent, disobedient, or dishonest servant. It is difficult in such a case as the present to suppose that the suggested misconduct or disobedience of the servant was not in reality for his master's benefit.

Redmond Barry, Q.C., in reply.

The following authorities were also referred to:—*Cooper* v. *Slade* (2); *Chisholm* v. *Doulton* (3); *Newman* v. *Jones* (4); *Somerset* v. *Wade* (5); *Reg.* v. *Bishop* (6).

Cur. adv. vult.

Dec. 19.

Gibson, J.:—

The Chief Justice is unfortunately unable to attend here to-day, but he has asked me to state that, though he entertains great doubt upon the question, he does not press his doubt to a dissent from the view taken by the other members of the Court.

The statute 5 & 6 Vict. c. 106, s. 40, contains elaborate provisions for securing the free passage of salmon during the weekly close time. A clear opening of four feet wide is to be made and kept free from obstruction; the netting of the leader must be raised and kept out of the water; all other nets except eel-nets are to be wholly removed and taken out of the water; the inscales, &c., must be removed or opened in such manner that a clear opening of not less than four feet from bottom to top shall be left, and a free space effectually secured for the passage of fish of all kinds.

(1) [1897] 2 I. R. 292.
(2) 6 H. L. Cas. 747, p. 793.
(3) 22 Q. B. D. 736.
(4) 17 Q. B. D. 132.
(5) [1894] 1 Q. B. 574.
(6) 5 Q. B. D. 259.

Any person *occupying* or using any fixed engine and failing to remove or open the same as required by the Act, and any person using any device or contrivance to prevent the free passage of fish are to forfeit and pay the sum therein mentioned; provided that there shall be no liability to penalty where floods, &c., prevent any person from removing leaders or making such openings. Section 58 contains further provisions with the same object.

The object of section 40 is to punish, first, persons who, occupying or using the fixed engine, do not during the weekly close time maintain a clear opening as prescribed; and, secondly, persons who employ devices or contrivances to prevent the free passage of fish. The occupier is under a continuous obligation to have the passage open, and, if it is obstructed contrary to the statute, he is under a continuous duty to remove the obstruction and open the passage, the only excuse being prevention by flood, &c., a form of *vis major* which could not be guarded against. Each time that the occupier fails to perform this duty, the statute is infringed: *Reg.* (*Ellis*) v. *Justices of Dublin* (1). To limit the penalty to the first failure to open would go far to make the section useless. A fixed engine may be used in such a way as to make the passage of fish impossible, and thereby become a nuisance; and the occupier of such an engine ought to look after it and see that the statutory conditions for its use are observed.

In the case before us the appellant as occupier entrusted the management and control of the fixed engine to a representative who, in violation of orders given at some antecedent period (the date of these is not given), closed the free passage during the weekly close time. The case does not disclose whether this was done for his master's profit or for his own private benefit. Can the occupier by delegating the performance of the statutory duty escape responsibility?

Mackey v. *Hosford* (2) was relied upon as establishing that the master was not responsible criminally for the unauthorised acts of a servant. Where the act is done for the apparent benefit of the employer, magistrates ought to be on their guard lest a colourable prohibition by the master, who may shut his eyes to his

(1) [1894] 2 I. R. 527. (2) [1897] 2 I. R. 292.

Q. B. Div. 1899.

FITZGERALD, *Appellant*; HOSFORD, *Respondent*.

Gibson, J.

representative's unlawful zeal, should enable the master to escape liability. A servant who violates the law usually thinks that his zeal will serve him; and it would be dangerous if the master should find it his interest to give perfunctory orders, and neglect the duty of seeing that those orders were obeyed. *Mackey* v. *Hosford* (1) was, however, quite different from the present case. It was decided on another statute. Whether its principle applies to persons using the devices forbidden by the second part of section 40 is a point not now calling for decision. It plainly has no bearing on a case where the occupier is bound to keep the passage open, and that duty is disregarded. Such occupier stands in much the same position as a railway company on which the Railways Clauses Act, 1845, section 47, imposes the absolute obligation to keep gates at a level crossing closed. Where the statute creates a direct and unqualified duty, the person obliged to perform the duty cannot escape under the doctrine of *mens rea*. The cases are considered and classified by Wright, J., in *Sherras* v. *De Rutzen* (2). A good illustration is supplied by the Sale of Food and Drugs Act, 1875, under which it was held that a vendor was liable for adulteration effected by a servant contrary to his express orders: *Brown* v. *Foot* (3); and even for acts of carriers without his knowledge and consent: *Parker* v. *Alder* (4); see also *Reg.* v. *Stephens* (5) as to nuisances.

The act here was not criminal in any real sense, but was prohibited in the public interest. The master's obligation is unaffected by the fact that he entrusted the management of the engine to a servant, and that his delegate violated his orders. Whether he would be liable for unlawful action of third parties in closing the passage raises a question not necessary now to decide. It may be that the occupier is bound to watch and guard the engine, and that he might be liable for neglect in this respect; or, possibly, he may be only responsible for the direct acts of himself and his own servants. Nor do I express any opinion whether the servant was within the first branch of the section, as a person using the fixed

(1) [1897] 2 I. R. 292.
(2) [1895] 1 Q. B. 918.
(3) 66 L. T. (N. S.) 649.
(4) [1899] 1 Q. B. 20.
(5) L. R. 1 Q. B. 702.

engine, or came under the second, as a person using a device forbidden by the Act.

No question was raised as to the form of the conviction, as the Court could amend it if necessary: *Shackell* v. *West* (1).

The decision of the magistrates was right.

MURPHY, J.:—

I concur in the judgment that has been delivered.

Solicitor for the appellant: *F. Fitt.*

Solicitor for the respondent: *D. R. Hilliard.*

A. E. R. J.

REG. (HAMILTON) *v.* CHAIRMAN AND JUSTICES OF COUNTY LEITRIM (2).

Justices—Quarter Sessions—Appeal, notice of—Service on solicitor of party—Duration of solicitor's authority—Petty Sessions (Ireland) Act, 1851, (14 & 15 Vict. c. 93), sect. 25, sub-sect. 5.

Notice of intention to prosecute an appeal against a conviction under the Fishery Acts was served upon the solicitor who had appeared for the complainant at Petty Sessions:—

Held that, his retainer having come to an end upon the making of the order at Petty Sessions, he had no authority to accept service of the notice of appeal, and that there was no valid service of the notice.

Reg. v. *Justices of Oxfordshire* ([1893] 2 Q. B. 149) followed.

CERTIORARI.

Johnstone and Travers, two fishermen, had been convicted at Petty Sessions on a summons at the suit of Hamilton, a local inspector of fisheries charging them with making use of a net "for the taking of salmon or trout" on the Bundrowes River, county Leitrim, not being owners of a several fishery therein,

(1) 2 Ell. & Ell. 326.

(2) Before PALLES, C.B., and JOHNSON, GIBSON, and BOYD, JJ.

Q. B. Div. 1899.

THE QUEEN v. JUSTICES OF LEITRIM.

contrary to 5 & 6 Vict. c. 106, s. 65. The order of conviction declared them "convicted as charged," and a penalty of £4 and costs was imposed on each. The defendants appealed from this conviction to the Quarter Sessions, but served the seven-day notice of their intention to appeal (which, by 14 & 15 Vict. c. 93, s. 24, sub-s. 5, is to be given in writing "to the opposite party"), not upon the complainant, but upon Mr. Alfred Stubbs, solicitor, who had conducted the prosecution on the complainant's behalf at Petty Sessions. When the case came on for hearing before the Chairman of Quarter Sessions (His Honour Judge Waters) at Ballyshannon, on the 24th May, 1899, Mr. Robert Lonsdale, solicitor, appeared on behalf of the complainant in the Court below (Hamilton), and objected that service not having been effected on the complainant personally, the notice was bad. There was no evidence one way or the other to show whether Mr. Stubbs had been authorized to accept service of the notice on his client's behalf. His Honour overruled the objection, and, having heard the appeal, reversed the conviction as bad on the ground of duplicity, and refused leave to amend.

The respondent at Quarter Sessions (Hamilton) then obtained, on the 20th June, 1899, a conditional order for a writ of *certiorari* to remove the order of reversal for the purpose of its being quashed, on the ground of want and excess of jurisdiction, and the insufficiency of the notice of appeal. Mr. Lonsdale's affidavit, on which the application was grounded, set out the facts as above, and stated that Mr. Stubbs had no authority to accept service of the notice of appeal on the complainant's behalf. No cause being shown, the order was made absolute in the office; and, on the 27th July, 1899, a writ of *certiorari* issued for the removal of the record. The Court of Quarter Sessions, in obedience to the writ, returned the record of the proceedings on the 18th August; and the applicant obtained, on the 8th November, a conditional order to quash the order of the Quarter Sessions unless cause shown.

The matter was now entered in the list upon order to show cause. There was no appearance for the respondents (1).

(1) Like applications in two similar cases were also heard and disposed of by the Court at the same time as the present case.

Conner, Q.C., for the applicant, being called on by the Court to substantiate his case, referred to *Reg.* (*Campbell*) v. *Justices of County Donegal* (1), where four Judges of the Queen's Bench Division (Ireland) had been equally divided on the question of the insufficiency of the service of this notice of appeal (under 14 & 15 Vict. c. 93, s. 24 (5)), on the respondent's solicitor; but he relied on *Reg.* v. *Oxfordshire Justices* (2), where, under the similar provisions of the English Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31, sub-sect. 2, it was held by the English Court of Appeal that the solicitor's retainer had come to an end on the making of the Justices' order, that he had no authority to accept service of the notice of appeal to Quarter Sessions, and that (under circumstances the same as in the present case) there had been no valid service of such notice.

PALLES, C.B.:—

We should, in my opinion, keep the decisions of the Courts in Ireland and in England in such matters as this as uniform as they can be, having regard of course to the words of the statutes which regulate the law in each country. Therefore, without expressing any opinion of my own, I follow *Reg.* v. *Justices of Oxfordshire* (2), because I find no substantial difference between the statute under which that case was decided, and the statute on which the present point arises. The order of the Quarter Sessions must accordingly be quashed.

JOHNSON, GIBSON, and BOYD, JJ., concurred, Johnson, J., pointing out that in *Reg.* (*Campbell*) v. *Justices of Donegal* (1), it had affirmatively appeared that the notice had come to the respondent's knowledge.

Solicitor for the applicant: *Alfred Stubbs.*

A. E. R. J.

(1) 24 Ir. L. T. R. 47. (2) [1893] 2 Q. B. 149.

Appeal.
1900.
Feb. 19, 20, 26.

IN THE MATTER OF THE FINANCE ACT, 1894; AND IN THE MATTER OF THE ESTATE DUTY ON PROPERTY PASSING ON THE DEATH OF THE REV. GEORGE STUDDERT (1).

Revenue—Estate duty—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *sect.* 5, *sub-sect.* 2—"*Settled property.*"

By marriage settlement dated the 7th October, 1861, certain trust funds were settled upon trust for A, the husband, for life, with remainder to B, the wife, for life, and after the death of the survivor, then, in the event, which happened, of there being no children of the marriage, upon trust as to the capital of the funds for such person or persons as the wife should appoint. The wife died on the 14th March, 1897, and on her death the Inland Revenue claimed, and were paid, estate duty on the value of her reversionary interest in the capital of the trust funds. The husband died on the 14th April, 1897, and the Inland Revenue claimed duty on the entire funds comprised in the settlement:—

Held (affirming the decision of the Queen's Bench Division), that the duty paid on the death of the wife was in respect of "settled property" within the meaning of sect. 5, sub-sect. 2 of the Finance Act, 1894, and that credit for it should be given as regards the duty, which would otherwise have been payable on the death of the husband.

Held, also by Fitz Gibbon, Walker, and Holmes, L.JJ., that the principle, which should govern this case, having been already decided by the English Court of Appeal in *Attorney-General* v. *Dodington* ([1897] 2 Q. B. 373), the Court of Appeal in Ireland ought not to differ from that Court on the construction of a statute imposing taxation.

THE case is reported in the Court below, *ante* p. 281.

The Crown appealed.

The Solicitor-General (*Wright, Q.C.*), *Matheson, Q.C.*, and *Charles MacDermot*, for the appellants.

Ronan, Q. C. and *Meredith*, for the executors of the Rev. George Studdert.

(1) In the Court of Appeal before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER, and HOLMES, L.JJ.

Appeal. 1900.

In re FINANCE ACT, 1894, *and* STUDDERT.

Feb. 26.

The arguments were substantially similar to those in the Queen's Bench Division already reported.

LORD ASHBOURNE, C. :—

This is an appeal from the order of the Queen's Bench Division, and it turns upon the construction of the "Finance Act," 1894, (57 & 58 Vict. c. 30), 5th section, sub-section 2, which enacts that "if estate duty has already been paid in respect of any settled property since the date of the settlement, the estate duty shall not . . . . be payable in respect thereof until the death of a person who was at the time of his death, or had been at any time during the continuance of the settlement, competent to dispose of such property."

The facts of the case are few and simple; and the outline of the respondent's contention is presented with great clearness in the letter of his solicitors dated 14th November, 1898, read by Mr. Ronan :—

4, KILDARE-STREET, DUBLIN,
14*th November*, 1898.

Re STUDDERT.

SIR,—Referring to previous correspondence—our position is this—Mr. and Mrs. Studdert died within a month of each other, and our present object is to ascertain the entire amount of duty payable in respect of both deaths. Our contention is that it should be calculated as follows :—On Mrs. Studdert's death duty on the property she was competent to dispose of, that is, the *corpus* of the fund subject to or diminished by the value of her husband's life-estate; on Mr. Studdert's death on the portion of the *corpus* on which duty had not been paid on Mrs. Studdert's death, or in other words, on the portion excepted from duty in her case. We conceive this to be the plain effect of section 5 (2), of the "Finance Act," and this is really the substance of the opinion of our Counsel sent to you. Kindly let us know if you will consent to the duty being assessed on this basis, otherwise we shall have to take proper steps to enforce what we believe our client's right in the matter.

We are, Sir,
Your obedient servants,
ROOKE & ROOKE.

Upon the death of Mrs. Studdert, which took place on the 19th March, 1897, the securities in respect of which estate

Appeal. 1900. *In re* FINANCE ACT, 1894, *and* STUDDERT. Lord Ashbourne, C.

duty was paid were, under the provisions of the settlement of the 7th October, 1861, held in trust, as to the income thereof, for the Rev. George Studdert for life, and after his death for his wife for life, and as to the capital thereof after the death of the survivor (there not being a child of the marriage who attained age or was married), for such person or persons as said Caroline Amelia Studdert, notwithstanding her coverture, should by deed or will appoint. Mrs. Studdert died a month before her husband.

The life-interest of the Rev. George Studdert in the settled funds did not then pass, nor had his wife an interest therein "ceasing on" her death. The reversionary interest, however, as the Chief Baron points out, in the capital of the trust moneys, subject to the life-interest of the Rev. George Studdert, being property of which Caroline Amelia was at the time of her death "competent to dispose," is, by section 2, to be deemed to have passed, and consequently estate-duty became payable upon the "principal value" of that reversionary interest "ascertained as" in the Act after "provided." The Commissioners ascertained the total value of the trust moneys at £3564 3*s.* 4*d.*; they then ascertained the life interest therein of the Rev. George Studdert to amount to £413 17*s.*, and having deducted the latter from the former sum, they ascertained the net value of the property, which was deemed to have passed to be £3150 6*s.* 4*d.*, and upon this estate duty amounting to £97 1*s.* 4*d.* was paid.

The Rev. George Studdert died within a month after the death of his wife, and then a claim was made by the Commissioners of Inland Revenue for payment of estate duty for a second time upon the securities comprised in the settlement, the second claim being for duty upon the full sum of £3564 3*s.* 4*d.* This claim for double estate duty is obviously of grave importance, and the right to demand it under the circumstances is the question involved in the case.

The sum of £106 8*s.* 11*d.* was paid in respect of the second duty; and the respondents now urge that the Commissioners of Inland Revenue were only entitled to estate duty on the value, at the time of Mrs. Studdert's death, of her husband George Studdert's life-interest, and demand repayment of the excess paid.

Does section 5, sub-section 2, support this contention and supply

an effective answer to the claim of the Inland Revenue? The real question, therefore, is whether its provisions apply to this case. Has the sum which was paid at the death of Mrs. Studdert "been paid in respect of any settled property"? Was it a payment of estate duty in respect of "settled property" within the meaning of section 5, sub-section 2? In my opinion the property in question was clearly "settled property," and so continued until the death of her husband, and the duty which was paid at Mrs. Studdert's death was clearly paid in respect of that "settled property."

It is contended by the Board that the duty paid on Mrs. Studdert's death was not paid in respect of the "settled property" mentioned in the section, the latter expression meaning the entire interest in such "settled property" in the entire value of the property valued as an interest in possession.

The appellants argue that the duty paid on the death of Mrs. Studdert was a payment not upon the settled property as a whole, but only upon the reversionary interest in that property vested in Mrs. Studdert at the time of her death. It must, I think, be conceded that but for section 5, sub-sect. 2, the respondents would be liable to double duty, but in the face of that section it can hardly be suggested that the Legislature intended to impose upon settled property two separate estate duties during the continuance of the settlement; and if the object of sect. 5, sub-sect. 2, was, to prevent this double duty becoming payable, it should not be given a construction which would not accomplish that end. I can readily see the grounds upon which the appellants insist upon a different construction, and Mr. Justice Gibson marshals the arguments which may be used on both sides. But after the best consideration I can give the subject I have arrived at the conclusion that the view of the Queen's Bench Division as to the construction of the section is correct, and I am happy to find this conclusion supported by clear authority. The question decided in *The Attorney-General* v. *Dodington* (1), is closely analogous to that raised in this appeal. It arose on the first sub-section of section 21 of the Act of 1894, which enacts that, except in a particular event, "estate duty shall not be payable on the death of a deceased

(1) [1897] 1 Q. B. 722; [1897] 2 Q. B. 373.

Appeal. 1900.

In re FINANCE ACT, 1894, *and* STUDDERT.

Lord Ashbourne, C.

person in respect of personal property settled by a will or disposition made by a person dying before the commencement of this Act, in respect of which property "probate duty has been paid or is payable." The personal property in question there was held upon trust to pay the income to the wife for life, and after her death, if her husband survived, to him for life, and after the death of the survivor upon trust for such person as the wife should by deed or will appoint. The wife died in the life time of her husband, before the commencement of the "Finance Act" of 1894, having appointed the property, as she was entitled in favour of persons duly described, and probate duty was thereby paid by her executors in respect of the value of the property so appointed, after deducting the value of the husband's life-interest. The husband died after the commencement of the Act. It was held that estate duty was not payable on the husband's death in respect of so much of the value as probate duty had been paid on.

The argument of the Attorney-General on behalf of the Crown, and the judgments of Vaughan-Williams, J., in the Queen's Bench Division, and of Rigby, L.J., in the Court of Appeal, assume the practical identity of cases falling under section 5, sub-sect. 2, of the Act, with the cases under section 21, sub-sect. 1, like that in *The Attorney-General* v. *Dodington* (1). The Commissioners of Inland Revenue did not appeal to the House of Lords from this decision. For these reasons, I am of opinion that the order of the Queen's Bench Division was right and should be affirmed, and this appeal dismissed with costs.

FITZ GIBBON, L.J.:—

The Solicitor-General almost admitted that this case was ruled against the Crown by *Dodington's Case* (1). In my opinion it was so ruled. *Dodington's Case* (1) was decided, no doubt, upon sect. 21 (1) with respect to probate duty, and this case must be decided with respect to estate duty under sect. 5 (2); but the English Attorney-General, both in the Queen's Bench and in the Court of Appeal, referred to sect. 5 to support his argument upon

(1) [1897] 1 Q. B. 722; [1897] 2 Q. B. 373.

sect. 21, and the defendant's counsel contended that their interpretation of sect. 21 fitted in exactly with the analogous provision of sect. 5, and their interpretation was upheld. Vaughan-Williams, J., in the Queen's Bench, and Rigby, L.J., in the Court of Appeal, both dealt with sections 21 (1) and 5 (2) as analogous, and Rigby, L.J. said that the case of estate duty was provided for by sect. 5 (2), and the case of probate duty by sect. 21 (1), in the same way, for the same purpose, and with the same effect.

Under these circumstances I hold this Court bound to follow the decision in *Dodington's Case* (1). I do not deny that, technically and strictly speaking, we have jurisdiction to refuse to follow a decision of the Court of Appeal in England, which we think wrong. But in such a case as this, if we did not follow it, the result would be that, upon a statute imposing the same tax upon property in the United Kingdom, the Court of Appeal in Ireland would make the Queen's Irish subjects pay more than the co-ordinate Court in England had declared to be payable in the sister country. I cannot conceive it to be our duty, or even to be competent for us, to create such a financial inequality as that; and no matter how strongly I might dissent from an English decision, under such circumstances I should hold myself bound to follow it, and to leave the House of Lords to settle the question.

I might say no more than that the present case is ruled by *Dodington's Case* (1), and that the appeal should, therefore, be dismissed. But we are told that it is the intention of the Crown now to carry the question to the House of Lords; and I venture to add whatever the statement of my opinion can add to the authority of two Judges of the English Queen's Bench, three Judges of the English Court of Appeal, and three Judges of the Irish Queen's Bench, because I agree in the conclusion at which they have all arrived. At the same time I will state my opinion, in favour of the Crown, upon the further question upon which Rigby, L.J. and some others have indicated doubts, whether the Crown has not been paid too much. The reasons for my conclusion apply to both points; and I confess, with all respect for the doubts of others, that my mind is reasonably clear upon the

(1) [1897] 1 Q. B. 722; [1897] 2 Q. B. p. 376.

Appeal. 1900. *In re* FINANCE ACT, 1894, *and* STUDDERT. Fitz Gibbon, L.J.

construction and effect of the statute. It seems to me that the scheme of the drafting of the Finance Act, 1894, was first, by sect. 1, to make estate duty payable upon the principal value of all property passing on death, and words were used in that section which would, *prima facie*, make the full poundage payable upon the entire principal value of the property, whether settled or unsettled, whenever any taxable estate or interest in such property passes upon a death; but then sect. 5 (2) and sect. 21 (1) were added to qualify the effect of sect. 1 by giving credit, as it were, upon any second passing of property upon which duty had been already paid, until such property got into the hands of a second owner competent to dispose of it. In effect, duty was to be paid only once upon each complete change of ownership. The reason why sect. 21 (1) is limited to the case of a person dying before the commencement of the Act, and is thus in its nature temporary, is because it deals with payments of previous duties, which are merged by the Act in the estate duty. Sect. 21 (1) will be *spent* as soon as all payments of the previous duties shall have been duly credited. Sect. 5 will thenceforth be the only operative enactment; it is permanent, and it applies to payments made under the existing Act, analogous to those to which sect. 21 applies when they are made under the previous Acts.

In interpreting sect. 1, the definitions of "property passing on death" compel us to hold that such passing takes place whenever *a taxable estate or interest passes*, and that taxable estates or interests include, in the case of "settled property," not merely estates and interests in actual enjoyment at the time—*e. g.* existing estates for life in possession—but also vested estates and interests expectant upon the determination of existing estates for life.

The distinction between settled and unsettled property consists in the fact that property when unsettled is undivided and entire. It passes wholly—*per mi et per tout* as it were—upon the death of its owner; and whenever it passes, the whole principal value of it pays toll to the Crown, and the estate duty is assessed upon the whole. When property is "settled," on the contrary, though the whole is put into settlement, the settlement cuts it up into distinct parts, each of which is "settled property" each of these parts has its own "principal value;"

each belongs to a different person, on whose death it alone passes; and though all the parts together make up the whole, the principal value of each part is less than the principal value of the whole.

The Crown gets various "pickings," in the way of stamp duties, settlement estate duty, and the like, out of "settled property," in addition to estate duty; and this affords a further reason for not allowing the fact that property has been "settled" to make estate duty payable upon the principal value of the whole when only a part passes upon the death of a person who, by reason of the settlement, is not the owner of the whole. The phrase "property of which a person is competent to dispose" is as applicable to a limited interest as it is to the entire property out of which such interests are carved; and I see no greater difficulty in applying the Finance Act to such limited interests in settled property when passing on death, than in applying it to unsettled property which passes once and for all whenever an absolute owner dies.

Section 7 (6) appears to me to be almost, if not entirely, conclusive that this is the intention of the Act. "Where an estate includes an interest in expectancy, estate duty in respect of that interest shall be paid." Therefore such an interest is taxable property which passes on death. But the duty "shall be paid at the option of the person accountable, either with the duty in respect of the rest of the estate" (which means the estate of the deceased, *not* the estate out of which the expectancy is carved), "or when the interest falls into possession." Therefore an expectancy may be treated as a separate "property," and the duty upon it may be separately ascertained and paid. If so, why should sect. 5 not apply to it? Q. E. D.

The Solicitor-General failed to show how sect. 7 (6) could be worked upon his construction of the Act, without making it the only result of postponing the payment of the duty upon an expectancy that double duty would be payable when it fell into possession. We cannot attribute to Parliament the intention to play a practical joke upon the tax-payer, by offering him the option of putting off the "evil day" of payment upon the terms of paying *double* when the day should come! On the

Appeal. 1900.

In re FINANCE ACT, 1894, *and* STUDDERT.

Fitz Gibbon, L.J.

other hand this section is inconsistent with the difficulty which pressed on Rigby, L.J., for it shows that the Act contemplates payments of estate duty at different times, upon distinct interests in the same "property," passing at different dates, each interest being "property passing on death," each having a distinct "principal value" of its own, and each being "settled property," though these interests must be added together to make up the whole property included in the settlement.

Applying the principles which I have indicated to sect. 2 (1), and to the present case, Mrs. Studdert at her death was "competent to dispose" only of the trust funds subject to, *and less by*, her husband's existing life interest. Her interest was "settled property"; it was vested; it was "property passing on her death;" and it was property of which at her death she was "competent to dispose." It was taxable; its principal value was ascertainable, and was in fact ascertained, by deducting from the principal value of the trust funds the value of the life interest which was then outstanding, which did not then pass, and which was then neither taxable nor taxed. Her husband enjoyed his life interest until he died; it also was settled property; on his death it, and it alone, passed to the appointees; the principal value of it, therefore, then became taxable; and the respondents admit their liability to pay the estate duty upon it. But the Crown claims duty, not only upon this, but also upon the value of the remainder, which did not then pass, but on which the estate duty had been already assessed as settled property which had passed on the wife's death. That actual payment had not been made was due to the shortness of the interval between the deaths of Mr. and Mrs. Studdert. The law must be the same as if her executors had paid the duty on the principal value of the expectancy years before the life estate fell in.

I find no difficulty in holding that sect. 5 (2), on the husband's death, applied to the expectancy, and prevented it from becoming again liable to duty. It was still "settled property" within the meaning of that sub-section. Estate duty had already been paid in respect of it, because the wife at her death had been "competent to dispose" of it. She was never "competent to dispose" of her husband's life estate, and therefore estate duty

had not been payable upon the value of that life estate at her death. But it passed on the husband's death, and estate duty then became payable upon its "principal value" under sect. 1. Thereupon and thenceforward, but then for the first time since the settlement, the whole property got into the possession and enjoyment of an owner competent to dispose of the whole. Whenever the whole passes on the death of that owner, estate duty will be payable again upon the principal value of the whole. But in the meantime, sect. 5 (2) protects that person, now that he has become possessed of the value of the life interest *plus* the remainder, from paying estate duty for a second time in respect of the "settled property" upon which the duty was paid when the wife died—*i. e.* the expectancy—or in respect of anything more than that "settled property" which passed on the husband's death—*i. e.* his life interest.

If I am right in all this, it equally answers the doubts of Rigby, L.J., in favour of the Crown, and the question upon the present appeal against the Crown; it gives the Crown the duty upon the principal value of the trust funds in two distinct payments, each payable upon the principal value of a distinct interest which is "settled property," upon the passing of that distinct interest, and these two interests together make up the whole; it saves the subject from paying the duty twice upon any part of the settled property during the continuance of the settlement, and it avoids all the extraordinary results which would follow if the amount or payment of duty on "settled property" were to depend upon the order in which the owners of successive limited interests might happen to die.

I cannot see that this solution of the question creates any difficulty under what are called the "Aggregation Clauses." The object of aggregation is to give graduated rates of duty according to the total value of the property passing upon a death, and it is just as easy to ascertain and aggregate the values of limited interests, as it is to ascertain and aggregate the values of estates in fee or absolute interests. This solution is supported by almost all the judgments yet delivered upon the question, here or in England; it is just, practicable, and in accordance with a reasonable interpretation of the Taxing Statute.

Appeal. 1900. *In re* FINANCE ACT, 1894, *and* STUDDERT.

If it be doubtful or difficult of interpretation, which I do not think it is, the Finance Act is subject to the rule that no tax can be imposed except by words which are clear, and the benefit of the doubt is the right of the subject.

WALKER, L. J.:—

In this case Mrs. Studdert was second tenant for life of the trust funds, with remainder to her general appointees, and upon her death, on the 19th March, 1897, leaving her husband surviving, the Crown assessed and were paid estate duty on the property which she was competent to dispose of, *i.e.* on the principal value of her reversionary interest: the sum of £413 17*s.* was deducted in respect of the value of her husband's life interest. He died on the 14th April, 1897, and the Crown now claims duty on the entire trust funds comprised in the settlement. This involves a double payment on the settled property to the extent in value of £3150 6*s.* 4*d.*

It cannot be disputed that the trust funds are comprised in a settlement, and are settled property. It may be conceded that the claim of the Crown is sustainable under sect. 2 (1) (*b*), unless the protection to settled property given by sect. 5, sub-sect. 2, extends to the case.

Mrs. Studdert was competent to dispose of the reversionary property in the settlement, and the words of sect. 2 find a subject to operate on. The contention of the Crown is that, to bring in the exemption, duty must have been paid in respect of the whole property, and that here it was not so paid by reason of the deduction. This is exactly the contention put forward unsuccessfully in *The Attorney-General* v. *Dodington* (1). The question depends on the true construction of sect. 5, sub-sect. 2. [His Lordship read the section.]

The object, broadly speaking, was to prevent double imposition on property the subject of a settlement. I do not see how the protection can be carried out without paying regard to the separate interests which are comprised in the settlement, and together make up the whole. The words "paid in respect of any settled

(1) [1897] 1 Q. B. 722; [1897] 2 Q. B. 373.

property since the date of the settlement" are satisfied by reading them, "in respect of any separate interest arising under the settlement." The words "payable in respect thereof" are of course as large as the preceding words. Thus here, when the reversionary interest of Mrs. Studdert has paid its assessed duty, it is not to pay it again till the event mentioned in the section happens. The unassessed interest remains, and will now bear duty, and thus the Crown will have by two payments got duty on the whole settled property during, in the words of the section, "the continuance of the settlement." The contention of the Crown would make duty payable twice on the same subject at the same time if the executors had exercised the option given them by section 7. I think the protection was intended for every separate interest in the settled property, as well as the aggregate of those interests. The Crown will get full duty on the death of a person in whom the whole settled property has centred, and that event is yet to happen. I do not lose sight of the view expressed by the Chief Baron that in this taxing enactment the payment on a part of the settled property would be sufficient to attract the exemption; but I do not think it necessary to rest my judgment on that view. Nor do I lose sight of the view expressed by Lord Justice Rigby in *The Attorney-General* v. *Dodington* (1), that the payment such as was made in this case after the death of Mrs. Studdert was in fact a payment on the whole settled property, and if this view be correct the contention of the Crown equally fails. But I prefer to adopt the reasoning of the Judges in the Queen's Bench Division in that case, and apparently of the Master of the Rolls, and Smith, L.J., on the appeal, and hold that the language of the section is satisfied by treating the payment as made in respect of interests in the settled property, and therefore "in respect of the settled property," leaving free the claim of the Crown in respect of the life estate of the first tenant for life.

I shall only add that I consider *The Attorney-General* v. *Dodington* (1) binding on us, being a decision on an imperial statute relating to taxation undistinguishable in principle from the case

(1) [1897] 1 Q. B. 722; [1897] 2 Q. B. 373.

Appeal. 1900.

In re FINANCE ACT, 1894, *and* STUDDERT.

before us, and also, if I may respectfully say so, absolutely correct in point of law.

HOLMES, L.J. :—

I do not feel myself justified, after the minute examination by the Judges of the Divisional Court and by my three colleagues of all the provisions of the Finance Act, 1894, that have any bearing upon the matter in controversy, and the exhaustive reasoning applied by them thereto, in saying more than what is necessary to indicate my view of the construction of section 5, sub-section 2 of the statute. There can be, I think, no doubt, that if it were not for this provision, estate duty would have been payable upon the death of George Studdert without any deduction therefrom on account of the estate duty payable on the death of his wife. At all events it has not been argued that this would not have followed from the 1st and 2nd sections if they stood alone; and for my own part I do not see how it could have been argued with success. It is enacted by the sub-section in question that "if estate duty has already been paid in respect of any settled property since the date of the settlement, the estate duty should not be payable in respect thereof until the death of a person who was at the time of his death or had been at any time during the continuance of the settlement competent to dispose of such property." "Settled property" means property comprised in a settlement; and the manifest object of the provision is to relieve such property in a certain event from liability to a second payment of the duty. Turning to the facts set forth in the petition, the property referred to therein was at the time of the death of Mrs. Studdert comprised in a settlement—that is to say, the indenture of the 7th October, 1861, the trusts of which have been already stated. If George Studdert had died in his wife's lifetime, the settled property would have passed to her on his death, and there would have been nothing in the sub-section quoted to relieve her from the payment of estate duty thereon inasmuch as it could not be said upon any construction of the language that estate duty had been already paid in respect of the settled property. Nor would the property have been relieved from estate duty upon her own death, having thus survived her husband, for in such case there

would have happened the event upon which according to the final clause, duty would be again payable. But she died in the lifetime of her husband, whose life estate under the settlement continued after her death, and who neither at the time of his death nor at any time previous thereto had been competent to dispose of the settled property. Therefore no estate duty was payable on that event if estate duty had already been payable in respect of such property. There only remains the narrow point—whether, within the meaning of the sub-section, duty was so payable upon the death of Mrs. Studdert. It is, in my opinion, quite clear that it was. If it were not payable in respect of the property comprised in the settlement, in respect of what was it payable? It is said on behalf of the Crown that it was only payable upon a reversionary interest in such property; but it was not for that reason the less payable in respect of the property comprised in the settlement. I do not feel myself at liberty to avoid giving the natural meaning to the language of a statute for the sake of furthering an intention which can only be a matter of conjecture. The Solicitor-General argued that the reversionary interest might be remote and of little value, and that it cannot have been intended that the small amount of duty payable in respect thereof was to relieve the settled property from all further payment. Perhaps it was not; but I think that the object of the sub-section was to prevent settled property from being liable to two separate estate duties during the continuance of the settlement, and that this object would be defeated, if the construction pressed for by the Crown were adopted. For my part I am in favour of the view which I understand to be that taken by Palles, C.B., and Madden, J., and which seems to be in accord with the opinion of Rigby, L.J., in *The Attorney-General* v. *Dodington* (1). I may say, however, that if I am to abandon the ordinary and natural meaning of the words in search of a construction which will carry out the supposed intention, I should prefer the one which has been adopted by the petitioners, and which makes the clause read thus:—"If estate duty has already been paid in respect of any interest in settled property since the date of the settlement, the

(1) [1897] 1 Q. B. 722; [1897] 2 Q. B. 373.

Appeal. 1900. *In re* FINANCE ACT, 1894, *and* STUDDE RT. Holmes, L.J.

estate duty shall not be payable in respect of such interest until," &c.

Having thus stated my own opinion upon the matter in controversy, I wish to add that even if I had been convinced by the arguments for the Crown, I should have felt myself obliged to affirm the order of the Divisional Court. I consider that this is substantially the same question as that decided in *The Attorney-General* v. *Dodington* (1) by the Court of Appeal in England.

This Court ought to be slow to differ from a judgment of the Court that holds a corresponding position in England, when the same law is administered in both. This ought to be the case, under any circumstances, but it would be exceptionally inconvenient and unseemly if the result of a difference in the interpretation of a statute passed to impose the same tax on the Queen's English and Irish subjects would be to produce inequality of taxation in the two countries. Such a consequence ought to be avoided even if individual opinion must be sacrificed. Let us in a case of this kind have agreement in the Courts of co-ordinate jurisdiction; and error, if it arises, can always be corrected by the supreme tribunal.

Solicitor for Inland Revenue: *R. O'Brien Furlong.*

Solicitors for the executors of the Rev. G. Studdert: *Rooke & Rooke.*

R. D. M.

(1) [1897] 1 Q. B. 722; [1897] 2 Q. B. 373.

In re M., an Arranging Debtor (1).

Q. B. Div. Bankruptcy. 1900. March 7, 13.

Bankruptcy—Arranging debtor—Discontinuance of business—Apprenticeship fee—Compensation to apprentice—Jurisdiction.

Where a person to whom an apprentice has been bound petitions the Court for an arrangement, and intends to abandon his business, the Court has jurisdiction under the Irish Bankrupt and Insolvent Act, 1857, section 353, where the circumstances of the case render it reasonable, to refuse to sanction the arrangement until so much of the apprenticeship fee is repaid to the apprentice, as would be ordered to be refunded to him if the proceedings were in bankruptcy.

This was an application on behalf of John M'Cormick, the father of William M'Cormick, a minor, that the sum of £200 be paid out to him in full by the arranging debtor as part of the arrangement; or, in the alternative, that the arrangement be adjourned into bankruptcy, on the ground that it would be unreasonable as against the said minor, if provision were not made for such demand in full. The apprentice was bound under an indenture of the 29th November, 1897, the fee being £500, and the arranging debtor undertaking to teach the apprentice the business of stockbroker. The apprenticeship was to last for three years from the 1st January, 1898, the sum of £60 to be paid to the apprentice during the first year; £70 during the second year; and £80 during the third year. The affidavits showed that the arranging debtor did not contemplate carrying on his business, his property being distributed among his creditors; and that, consequently, the apprentice would lose the benefit of the apprenticeship deed from the date of the arrangement.

Ignatius O'Brien, Q.C., for the applicant:—

In bankruptcy the apprentice would be entitled under section 250 of the Act of 1857 to repayment of some portion of the

(1) Before Boyd, J.

Q. B. Div. 1900. In re M.

apprenticeship fee, and would not be compelled to prove with the other creditors. It would be unreasonable that an arrangement should be carried, and no provision made similar to what the apprentice would be entitled to, if there had been an adjudication. [See the opinion of Miller, J., in *In re J. L.* (1).]

R. Doyle, for the arranging debtor :—

Section 250 does not apply to an arrangement matter. The claim, however, is capable of proof under section 46 of the Act of 1872 ; and that is the course that the Court ought to sanction.

March 13.

Boyd, J. :—

In bankruptcy apprentices are placed in a particularly favourable position under section 250, and if this case had been in bankruptcy, I should certainly have made an order for a return of portion of the fee. It is said that the section does not apply to an arrangement, and that the Act of 1872, which amended the Act of 1857, made no alteration in this respect. That, no doubt, is perfectly true, but a reason can be found for this in the large power which is given to the bankruptcy Judge under the 353rd section of the Act of 1857, which enables him to veto an arrangement which, in his opinion, is unreasonable to be carried as against any particular person who was either a creditor or one that in bankruptcy would be in a better position than in an arrangement. Where an apprentice is deprived of the benefits of the apprenticeship deed by an arrangement, and the arranging debtor appears to be giving up his business, it would be, in my opinion, most unreasonable, especially where so large a fee had been paid as £500, to sanction an arrangement which did not make special provision for the repayment of portion of the premium.

Solicitor for the applicant : *Doyle.*
Solicitors for the arranging debtor : *Hayes & Son.*

J. MAC M.

(1) 8 Ir. L. T. R. 160.

GAFFNEY, TENANT; FETHERSTONHAUGH, LANDLORD (1).

Land Com. 1899.
April 19. June 27.
Appeal. 1899.
Nov. 15, 16. Dec. 21.

Landlord and Tenant—Land Law (Ireland) Acts, 1881 *to* 1896—*Pasture holding ordinarily used with residential holding—Crucial date at which user must exist—Land Law (Ireland) Act*, 1896, *sect.* 5 (*c*) (ii).

The 5th section of the Land Law (Ireland) Act, 1896, provides that the Land Law Acts shall not apply, amongst others, "to a tenancy in a holding . . . which is let to be used wholly or mainly for the purpose of pasture . . . if the tenant does not actually reside on the holding, or where the holding adjoins or *is ordinarily used* with another holding, then on the latter holding":—

Held, by the Court of Appeal (Lord Ashbourne, C., *diss.*), reversing the decision of the Irish Land Commission pronounced by Meredith, J., that the crucial date at which the holding, in respect of which the benefit of the Land Law Acts is sought, must be "ordinarily used" within the meaning of this section, is the date of the passing of the Act of 1896, and not the date of the passing of the Act of 1881.

THE facts appear sufficiently from the judgment of Mr. Justice Meredith.

Denning, for the tenant.

Chaytor, for the landlord.

MEREDITH, J.:— June 27.

On 21st July, 1881, an agreement in writing was made between Mr. Fetherstonhaugh, the landlord, and Hugh Gaffney the uncle of the tenant before the Court. Almost every sentence of that agreement is of importance. It recites that "the tenant has applied to the landlord to let him the holding hereinafter described as a grass farm, and to be used wholly for the purposes of pasture"; and that "the tenant does not reside on the said holding, and that it is not intended that he should do so under this agreement, and

(1) Before MEREDITH, J., and the Hon. GERALD FITZ GERALD, Q.C., and O'BRIEN, Commissioners.

Land Com. 1899.

GAFFNEY, *Tenant;* FETHERSTON-HAUGH, *Landlord.*

Meredith, J.

the said holding does not adjoin, and has not been ordinarily used with the holding on which he actually resides." It then recites that "the said holding and another held by the said tenant from the said landlord are together valued under the Acts relating to the valuation of property in Ireland at an annual value of £50." It proceeds, "The landlord in consideration of the rent hereinafter reserved, and the agreements on the tenant's part hereinafter contained, agrees to let, and the tenant agrees to take, from the 1st May last as a yearly tenant all that and those that part of the lands of Stonestown and Ballinacor, hitherto held by the said tenant, containing 48A. 1R. 14P. Irish plantation measure, as a grass farm, and to be used wholly for the purpose of pasture, at a yearly rent of £81 6*s.* 10*d.*" The provisions include "(3) the tenant shall treat the lands in a fair, proper, and husbandlike manner, and use the same wholly for the purpose of pasture, and will not till or break up the same or any part thereof save the portion used as a herd's garden." Clause 4 says:—"The tenant shall not mow or cause to be mown more than fifteen acres of the said lands in any one year without obtaining the previous consent of the landlord in writing, and shall not sell or dispose of any meadow whilst growing, or hay, when cut, but, on the contrary, shall consume on the lands all the hay and grass grown thereon." And clause 6 says:—"The tenant shall not, without previously obtaining the consent in writing of the landlord, erect any house or building or commence or make any buildings on the said premises, or any part thereof, but shall be at liberty to complete the building already partially erected, but the same is to be used as an office and not as a dwelling-house without the landlord's permission."

That the holding was under this agreement let to be used wholly or mainly for the purpose of pasture cannot be controverted or denied. That the user has been in accordance with the contract of letting is clearly established by the evidence adduced before us, as also by the report of the Court valuers, which states that "the holding is all used in pasture, and is suitable for feeding store cattle and sheep. There are no buildings on the farm. Suitably used as a grazing farm, and in normal condition." The building which, under the agreement of 1881 the tenant was at liberty to complete and use as an office, has never been completed, and the

holding is to-day, as it was in 1881, a pasture farm. The poor law valuation of the farm is, however, £67 10*s.*, and the tenant relies upon the provisions of section 5, sub-section 1 (*c*), of the Land Act of 1896, as entitling him to maintain the decision in his favour arrived at by the Sub-Commission.

The original tenant, Hugh Gaffney resided, and his nephew, the tenant before the Court, resides on a farm called Ballyhaw (which is also held from Mr. Fetherstonhaugh), distant about four Irish miles from the Stonestown farm, which is the holding now before the Court. Ballyhaw was at the passing of the Land Act of 1881, and is still, the holding on which the tenant of Stonestown actually resided and resides. But Ballyhaw does not adjoin Stonestown, and the question for decision is thus narrowed down to this—Is the Stonestown holding ordinarily used with the Ballyhaw holding, within the meaning of sub-section 1 (*c*) (ii) of the 5th section of the Land Act of 1896?

The tenant Thomas Gaffney, and his herd, have given evidence which, while it may be open to the criticism that many of the phrases employed bear a suspicious resemblance to the language of decided cases, nevertheless, satisfied me and my colleagues that from 1884, at all events, and, probably from a period prior to that date, there has been a constant interchange of stock between the two farms, and user of a character to constitute "ordinary user" of the two holdings as one concern. Indeed, if it were not for the agreement of 21st July, 1881, and the authorities to which I shall presently refer, I, and my colleagues, as jurors, would have been prepared to hold that the inference of fact to be drawn from the evidence was that the Stonestown farm "is ordinarily used" with the Ballyhaw farm. However, the cases of *Maguire* v. *King* (1) and *M'Kelvey* v. *Cole-Hamilton* (2) are, in my opinion, binding on this Court, and preclude us from deciding in the tenant's favour.

Maguire v. *King* (1) was decided in the year 1893 by Mr. Commissioner Fitz Gerald and Mr. Commissioner Wrench, Mr. Commissioner O'Brien dissenting. The judgment of the Court was given by Mr. Commissioner Fitz Gerald, who said:—"The holding is clearly pastoral; the tenant proves that he now uses it with the

(1) 28 I. L. T. R. 13. (2) 29 I. L. T. R. 134.

Land Com. 1899.

GAFFNEY, *Tenant;* FETHERSTON-HAUGH, *Landlord.*

Meredith, J.

holding on which he resides, but he only acquired that some seven years ago; he also proves that he was tenant of the holding, on which he now seeks to fix a rent, for the last twenty-two years, and that down to 1882 it was used with a holding belonging to his father, and situate near it, on which he and his father resided. The right of the tenant to fix a fair rent on such a holding as this must be decided by reference to the state of things at the date of the passing of the Act, the 22nd August, 1881, and at this date the holding now before the Court was not used by the tenant with any holding of his on which he resided. We think the adjoining or residential holding must be the holding of the tenant of the pastoral holding, and, therefore, we affirm the dismiss of the Sub-Commission." *M'Kelvey* v. *Cole-Hamilton* (1) is a decision pronounced in the year 1895 by Mr. Justice Bewley. He said:—"On the evidence I am clearly of opinion that the mountain farm and the Trinamadan farm were, at the date of the passing of the Land Act, 1881, and are still, worked together as one common concern, and that the holding before the Court was and is 'ordinarily used with' the Trinamadan farm, within the meaning of section 58 (4) of the Land Act of 1881. On the question of the tenant's residence the material facts are as follows:—From some date prior to 1873 until the year 1884, the tenant resided exclusively upon the Trinamadan farm; but in the latter year, in order to obtain greater advantages for the education of his children, he took a place called Keolin, within a mile of the town of Omagh. That had since been his principal residence, but some members of his family live on the farm at Trinamadan, and he is in the habit of staying there for a considerable number of days in each year for the purpose of looking after the Trinamadan farm and his other farms in the neighbourhood. In 1894 he spent 141 days at Trinamadan; in 1893, 176; and in 1892, 174. But on this branch of the case the first point to be considered is at what period of time must the conditions exist to entitle a tenant to claim the benefit of the exception contained in sub-section 4 of section 58 of the Act of 1881. This appears to me to be virtually ruled by the decision of the majority of the Court of Appeal in *Nelson* v. *Headfort* (2). According

(1) 29 I. L. T. R. 134. (2) 21 I. L. T. & S. J 67; 18 1 R. Ir. 407.

to the principles laid down in that case the time at which these conditions must exist to bring a holding, let to be used wholly or mainly for the purposes of pasture, within the fair rent provisions of the Act of 1881 was the date of the passing of the Act. If at that date such a holding did not adjoin, or was not ordinarily used with the holding on which the tenant then resided, it was excluded for ever; and the subsequent acquisition of an adjoining holding by the tenant, or a change of residence on the part of the tenant, could not give him a status to apply to fix a fair rent."

These cases decided that the crucial period for determining whether a pasture holding "is ordinarily used" with a residential holding is the 22nd August, 1881, and having regard to the terms of the agreement of the 21st July, 1881, and to the recitals therein contained, I fail to see how it is possible to hold that within a month of the signing of that agreement Stonestown farm was ordinarily used with the Ballyhaw farm. It certainly would require overwhelming evidence to convince me that the user could have been so completely changed, and the new mode of user could have become the ordinary user of the holding in the short interval that elapsed between the agreement and the passing of the Land Act of 1881. I feel therefore bound to yield to the contention of Mr. Chaytor, and decide that having regard to the terms of the agreement this holding was not ordinarily used with the Ballyhaw farm on the 22nd August, 1881.

This disposes of the case, for I cannot accede to the suggestion that the crucial date has been altered by the 5th section of the Land Act of 1896, coupled with the repeal by the 52nd section of sub-sections 3 and 4 of section 58 of the Act of 1881. Reading section 5 as a whole, emphasizing the opening sentence of sub-section 1, and further bearing in mind the provisions of section 50, sub-section 3, I am of opinion that the crucial date indicated by the word "is" has not been altered, and that the Act of 1896 "amends the law" relating to pasture holdings by extending the limit of rateable value to £100, and the admission of holdings let to be used for a dairy farm to the benefit of the Land Law Acts, but does not alter the crucial period for determining whether such holdings otherwise come within the scope and operation of

Land Com. 1899. GAFFNEY, *Tenant;* FETHERSTON-HAUGH, *Landlord.*

the Land Law Acts. For these reasons we discharge the order of the Sub-Commission, and dismiss the originating notice of the tenant with the usual costs.

Appeal. 1899. Nov. 15, 16, Dec. 21.

The tenant appealed to the Court of Appeal. (LORD ASHBOURNE, C., FITZ GIBBON, and HOLMES, L.JJ.)

Healy, Q.C., and *Denning*, for the tenant.

Ronan, Q.C., and *Chaytor*, for the landlord.

Cur. adv. vult.

Dec. 21.

LORD ASHBOURNE, C.:—

This is an appeal from the Land Commission, and involves the consideration of some few facts which can be shortly stated, and the construction of some sections of the Irish Land Acts of 1881 and 1896.

In July, 1881, an agreement in writing was made between Mr. Fetherston-H., the landlord, and Hugh Gaffney, the uncle of the tenant before the Court. It recites that "the tenant has applied to the landlord to let to him the holding hereinafter described as a grass farm, and to be used wholly for the purposes of pasture," and that, "the tenant does not reside on the said holding, and it is not intended that he should do so under this agreement, and the said holding does not adjoin, and has not been ordinarily used with, the holding on which he actually resides." It recites that "the said holding and another held by said tenant from said landlord are together valued under the Acts relating to the valuation of property in Ireland at an annual value of £50." It proceeds, "the landlord in consideration of the rent hereinafter reserved, and the agreement on the tenant's part hereinafter contained, agrees to let, and the tenant agrees to take from the 1st day of May last as a yearly tenant all that and those that part of the lands of Stonestown and Ballinacor hitherto held by said tenant, containing 48A. 1R. 14P. Irish plantation measure, as a grass farm,

and to be used wholly for the purpose of pasture, at a yearly rent of £81 6*s.* 10*d.*"

The agreement contains other provisions all going to show that the holding was let to be used wholly or mainly for the purpose of pasture, and in fact the user has been in accordance with this view.

The holding is now, as it was in 1881, a pasture farm. The poor law valuation of the farm is, however, £67 10*s.*; and the tenant relies upon the provisions of section 5, sub-sect. 1 (*c*) (ii), of the Land Act of 1896 as entitling him to maintain the decision in his favour arrived at by the Sub-Commissioners. The original tenant, Hugh Gaffney, resided, and his nephew, the tenant before the Court, resides on a farm called Ballyhaw (which is also held from Mr. Fetherston-H.), distant about four Irish miles from the Stonestown farm, which is the holding now before the Court. Ballyhaw was at the passing of the Land Act of 1881 and is still the holding on which the tenant of Stonestown actually resided, and resides. But Ballyhaw does not adjoin Stonestown, and the question arises—Is the Stonestown holding ordinarily used with the Ballyhaw holding, within the meaning of subsection 1 (*c*) (ii) of the 5th section of the Land Act of 1896? The tenant, Thomas Gaffney, and his herd, have given evidence which satisfied the Land Commission that from 1884, at all events, there had been a constant interchange of stock between the two farms, and user of a character to constitute ordinary user of the two holdings as one concern. Mr. Justice Meredith says:—"Indeed, if it were not for the agreement of the 21st July, 1881, and the authorities to which I shall presently refer, I and my colleagues, as jurors, would have been prepared to hold that the inference of fact to be drawn from the evidence was that the Stonestown farm 'is ordinarily used' with the Ballyhaw farm." However, the cases of *Maguire* v. *King* (1), and *M'Kelvey* v. *Cole-Hamilton* (2), were held binding by the Land Commission, and treated as authorities showing that the right of the tenant to fix a fair rent on such a holding must be decided by reference to the state of things at the date of the passing of the Act of 1881—the 22nd August, 1881.

(1) 28 I. L. T. R. 13. (2) 29 I. L. T. R. p. 134.

Appeal. 1899. GAFFNEY, *Tenant;* FETHERSTON-HAUGH, *Landlord.* Lord Ashbourne, C.

M'Kelvey v. *Cole-Hamilton* (1) is a decision of Mr. Justice Bewley, who said:—"The first point to be considered is at what period of time must the conditions exist to entitle a tenant to claim the benefit of the exception contained in sub-section 4 of section 58 of the Act of 1881. This appears to me to be virtually ruled by the decision of the majority of the Court of Appeal in *Nelson* v. *Headfort* (1). According to the principles laid down in that case the time at which these conditions must exist to bring a holding let to be used wholly or mainly for the purpose of pasture within the fair rent provisions of the Act of 1881 was the date of the passing of the Act. If at that date such holding did not adjoin, or was not ordinarily used with, the holding on which the tenant then resided, it was excluded for ever, and the subsequent acquisition of an adjoining holding by the tenant, or a change of residence on the part of the tenant, could not give him a status to apply to fix a fair rent." This decision was, however, before the passing of the Act of 1896, and cannot really much assist us in the decision of this case.

The Land Commission decided that the crucial period for determining whether a pasture holding "is ordinarily used" with a residential holding is the 22nd August, 1881, and that having regard to the the terms of the agreement of the 21st July, 1881, and to the recitals therein contained, it was not possible to hold that, within a month of the signing of that agreement, Stonestown farm was ordinarily used with the Ballyhaw farm. This would be clear if the Act of 1881 stood alone, and were to be applied as interpreted in *Nelson* v. *Headfort* (2).

The argument, however, has been pressed that the crucial date has been altered by the 5th section of the Land Act of 1896. That is the real question in the case. Taking that section as a whole, I think that the crucial date indicated by the word "is" in the Act of 1881 has not been altered, and that the Act of 1896 "amends the law" relating to pasture holdings by extending the limit of rateable value to £100, and the admission of holdings let to be used for a dairy farm to the benefit of the Land Law Act, but does not alter the crucial period for determining whether such

(1) 29 I. L. T. R. 134. (2) 21 I. L. T. & S. J. 67; 18 L. R. Ir. 407.

holdings otherwise come within the scope and operation of the Land Law Acts. The changes made by section 5 of the Act of 1896 are to be read into the Act of 1881, and take the place of what is repealed in the Act. Some new and amended definitions are to be inserted in place of some which heretofore were to be found in section 58 of the Act of 1881. I can find nothing in section 5 of the Act of 1896 indicating that it was to be read separately and independent of the Act of 1881. It commences:—"The Land Law (Ireland) Acts, except section 7 of the Land Law (Ireland) Act, 1881, shall not apply to the following tenancies." Section 50 (3) further supports this view: "Parts I. and II. of this Act" (which includes section 5) "shall be construed as one with the Land Law Acts, and together with those Acts may be cited as the Land Law Acts, and shall apply to all holdings to which the Land Law Acts or any of them as amended by this Act apply."

If section 58 is read with the substitution of the new words of the Act of 1896 for the parts repealed, it will be seen that the consequence of no longer looking for the crucial date in the Act of 1881 would be to have two crucial dates for the purposes of the same section, one for the unrepealed part of section 58, and the other for the new part which has been substituted for the part repealed by section 5 of the Act of 1896. For these reasons, I am of opinion that the judgment of Mr. Justice Meredith was right, and the order of the Land Commission should be affirmed; but as my colleagues take a different view as to the crucial date, they will pronounce the order of the Court.

FITZ GIBBON, L.J.:—

Two points were argued for the respondent—first, that the holding in question has not been, in fact, "ordinarily used" with the holding on which the tenant resided, within the meaning of the Land Law Acts; second, that, in law, "the crucial date" at which it must be so used for the purpose of enabling the tenant to fix a fair rent upon it, is the date of the passing of the Act of 1881.

I cannot yield to Mr. Healy's contention that we cannot consider the first point because the Land Commission has decided it

Appeal.
1899.

GAFFNEY, *Tenant;* FETHERSTON-HAUGH, *Landlord.*

Fitz Gibbon, L.J.

in the tenant's favour, and the landlord has not brought a cross-appeal. It is the duty of this Court, when it differs from the Court below, to make the order which ought to have been made in the first instance. Before giving judgment against a respondent, whether he has served a cross-appeal or not, we must decide that the appellant is entitled to such judgment. The tenant must bring himself, in fact as well as in law, within the Land Law Acts, before we can remit the case to the Land Commission to fix a fair rent. In dealing with a decision of the Land Commission upon appeal, we have not to deal, as in the case of a verdict of a jury, or as upon a case stated under the Registration Acts, with the exercise by the Court of first instance of an exclusive or ultimate jurisdiction upon questions of fact. Where the fact has been found by a jury, or by a revising authority, we can give judgment the other way only when the finding is "*against evidence*," i.e. has no sufficient evidence to sustain it in point of law; but where a question of preponderance of evidence arises, unless we can direct a new trial, we must accept the facts as found by a Court of first instance which has exclusive jurisdiction to ascertain facts. The Chancery Division, and the Land Commission, in cases such as this, have no such exclusive jurisdiction, and, on appeal from them, the duty of reviewing and deciding questions of fact as well as of law devolves upon this Court.

At the same time, for cogent reasons of justice, as well as of comity and convenience, we ought not to set up our own conclusions upon such questions against those of the Court below, unless well assured that we are right, and we should be especially slow to reverse the findings of a tribunal, such as the Land Commission, which has better means of weighing the evidence, and has special qualifications for forming correct conclusions, upon matters involving technical considerations.

In the present case I am not prepared to differ, upon the question of the user of the holding, from the Land Commission and the Sub-Commission. I agree that the recital in the contract of letting is not only *evidence* of the state of facts at its date, but also raises a presumption of the continuance of that state of facts up to the date of the passing of the Act of 1881. From 1884 down to the present time, there is affirmative evidence to sustain

the finding that the holding has been "ordinarily used with" the holding on which the tenant has resided. These words in the Land Law Acts seem to me to import something more than occasional interchange of stock, or other non-essential community of user, between two holdings. I should look for something indicating *unity* of user: something like what has been described in this Court, in judgments upon the somewhat analogous provision as to accommodation land, as a user of the two holdings as "one concern," or as a "single establishment."

In the present case, at least since 1884, and certainly in 1896, I think that the holding has not been used as a separate farm, complete in itself. It has had no tillage upon it; it was, and is, a "grazing farm"; stock could not be maintained upon it alone, and were not kept upon it, throughout the year, without recourse to other land. Its wants were supplied by using it with the holding upon which the tenant resided. He was a farmer, living by farming; the two farms formed his landed capital; and this holding may, I think, be fairly described as the grazing department of his single business of stock-raising. The mere distance between the two pieces of land is not sufficient to show that the inference of fact that each of the holdings was "ordinarily used with" the other, in the sense of the Land Law Acts, is wrong.

I therefore cannot yield to the temptation, which Mr. Ronan deftly held out, of escaping the task of interpreting the law by deciding the fact in the landlord's favour, and I must take the fact to be that in 1896 the holding was, and still is, ordinarily used with the holding on which the tenant resided.

Upon the question of law, I recognize the existence of difficulties in the way of either interpretation of the Act of 1896; but I find those in the landlord's way insurmountable. The words "is in the occupation" in the Act of 1881, sect. 58 (2), have been conclusively interpreted to speak from the date of the Act in which they occur, and as making that "the crucial date." The decision of this Court in *Nelson* v. *Headfort* (1) to that effect was adopted and enforced by the Act of 1887, sect. 9.

It is impossible to fix a different date for the effect of the

(1) 21 I. L. T. & S. J. 67; 18 L. R. Ir. 407.

Appeal. 1899.

GAFFNEY, *Tenant;* FETHERSTON-HAUGH, *Landlord.*

Fitz Gibbon, L.J.

words "*is* in the occupation" in sub-sect. 2, from that which has been thus fixed for the words "*is* ordinarily used" in sub-sect. 4. The question is, therefore, reduced to this—Is the date from which the very same words speak, when used in the Act of 1896, sect. 5 (1) (*c*) (ii), the date of the Act in which they occur; or, when used in 1896, can they be ante-dated to the time when they had been used in the previous Act of 1881? I cannot understand how they can be so ante-dated, without holding that the section in which they were used in 1881 is still in force. But this I cannot do, because the Act of 1896, by sect. 52, and sched. ii., repeals sect. 58, sub-sects. 3 and 4 of the Act of 1881. By the repeal the exceptions were gone, and I know no principle of interpretation of statutes by which the Act of 1896, sect. 5 (1) (*c*), which has been substituted for them, can speak from any date but its own, nor by which the repealed Act can still govern the Act which has taken its place. The argument founded on the repeal being partial is met by the answer, Why repeal at all anything which was to continue in force? What was not repealed stands—what is repealed is gone—why one was taken and the other left, the Legislature alone can tell.

Arguments from supposed "policy," or difficulties suggested upon other sections, cannot countervail express legislation. The effect of similar words, when used in 1881, was determined by *Nelson* v. *Headfort* (2). The Legislature recognised that decision in 1887, and in 1896 it amended and incorporated the Acts of 1881 and 1887, and it incorporated them as amended with the Act which used the same words in 1896. I must hold that these words then spoke from the date of their enactment, as the repealed words had done before them, and not from the date of the Act which had used them fifteen years before, but which was repealed. While holding myself bound to decide in favour of the tenant upon the provisions to which I have already referred, I find much to sustain the same conclusion elsewhere. The Act of 1896 extended the power of fixing a fair rent to a number of tenants who had previously been excluded. The sub-section in question extended it to holdings valued between £50 and £100, and to dairy farms.

(1) 21 L. L. T. & S. J. 67; 18 L. R. Ir. 407.

Could admission to these extensions be made dependent on the state of facts existing in 1881? Sect. 50 (2) enacts that an application to fix a fair rent for a holding "shall not be refused on the ground of any previous decision . . . if such application can be sustained under this Act, or any of the Land Law Acts, as amended by this Act." It therefore contemplates the admission, by change in the law, of tenants who had previously been excluded, even by express decision. Sub-sect. 3 enacts that "Parts 1 and 2 of this Act" (including sect. 5) "shall be construed as one with the Land Law Acts, and together with those Acts shall apply to all holdings to which the Land Law Acts, or any of them, *as amended by this Act*, apply." The repealed sections cannot be included in this provision. They are no longer part of the Land Law Acts. "A piece of new cloth" does not itself become old by being "put unto an old garment." Its newness only makes it unsuitable for such a position. The amendment speaks from 1896, when it was made. The existence of a "present tenancy," meaning a tenancy subsisting in 1881, is still necessary, because the definition contained in the Act of 1881, sect. 57, is unrepealed, and is incorporated by the Act of 1896 with the Land Law Acts as amended by that Act. But we have to deal with the exclusion from the Acts of a certain class of holdings in which "present tenancies" subsist, and therefore the definition of a "present tenancy" cannot touch the question. What is "the crucial date" at which the exclusion enacted by sect. 5 (1) (*c*) of the Act of 1896 takes effect? It must, in my opinion, speak from, and operate upon the facts existing at, the date of its enactment. *M'Kelvey* v. *Cole-Hamilton* (1) was decided in 1895, and is therefore immaterial save so far as it may be presumed to have been present to the mind of the Legislature in 1896. In my opinion the case must be remitted to the Land Commission, to proceed thereon as to justice shall appertain, it appearing that the holding was, at the date of the passing of the Act of 1896, ordinarily used with another holding on which the tenant then resided.

The landlord should pay the costs of the appeal, and so much

(1) 29 I. L. T. R. 134.

Appeal. 1899. GAFFNEY, *Tenant;* FETHERSTON-HAUGH, *Landlord.*

of the costs before the Land Commission as may be rendered useless by the reversal of the order appealed from. The other costs before the Land Commission will be reserved for the Commissioners.

HOLMES, L. J.:—

Although I have come to a different conclusion from that of the Land Commission, I concur in much that was said by Mr. Justice Meredith in giving judgment.

I agree with him that the holding was let to be used wholly or mainly for the purpose of pasture, and that the user has been in strict accordance with the contract of letting. Like him, I regard the recital in the contract as conclusively negativing that the holding thereby demised was ordinarily used with the holding on which the tenant actually resided, not only when the letting was made, but down to a period at which a different mode of user is proved to have existed. I also accept the inference drawn by him from the evidence, that, at the time of the hearing, and for many years before the two farms were managed as one concern, and therefore that during the period covered by such evidence, the pasture and residential holdings were ordinarily used together. I have no means of fixing the date at which the change of user took place, and indeed I am at liberty to doubt whether it took place at all. It is possible that the two farms have always been used together as they are now; but I am obliged to accept the recital to the contrary contained in the agreement, and I am unable to refer the present state of things to an earlier date than that to which the evidence goes back, that is to say, to the year 1884, or perhaps, a little later.

I am thus in accord with the Land Commission in their conclusions of fact; and I should have decided the case, as they have done, if it had arisen before the Act of 1896 became law.

Nelson v. *Headfort* (1) is an authority binding on this Court; and even if I differed from the view taken by the majority of the Judges therein, I should be obliged to follow it. I see, however, no reason for doubting the soundness of that decision. It gives

(1) 21 I. L. T. & S. J. 67; 18 L. R. Ir. 407.

to the language of the statute its natural and ordinary meaning; and it gets rid of the uncertainty and inconvenience which would have followed from any other construction, and which it is difficult to believe could have been contemplated by the Legislature. The portion of the Act of 1881 then under consideration was that part of the 2nd sub-section of the 58th section which deals with townparks. In it there occur the words "a holding . . . which is in the occupation of a person living in such city or town, or the suburbs thereof"; and the question was to what period of time were the occupation and residence thus described to be referred. It was held that what was meant was occupation and residence at the time of the passing of the Act—in other words, that when the Legislature spoke of land which *is* in the occupation of a person *living* in a city, it meant *now* in the occupation of a person *at present* living in a city. In the case before the Court, we are dealing with a pasture holding; and it seems to follow necessarily from the judgment in *Nelson* v. *Headfort* (1), that when the 4th sub-section of the 58th section speaks of a holding, the tenant of which does not actually reside thereon, the residence here indicated must also be referred to the time of the passing of the Act; and if this be so, it is impossible to hold that the proviso that follows, and which excepts a holding that is ordinarily used with the residential holding, relates to a different period.

Up to this point, I have gone step by step with Mr. Justice Meredith; but I now came to the parting of our respective ways. This case cannot be decided, as *Nelson* v. *Headfort* (1) was, under the 58th section of the Act of 1881, inasmuch as the portion of that section that relates to pasture holdings has been repealed by the Land Law (Ireland) Act, 1896.

It is to be remembered that the effect of this repeal, if there were nothing more, would be that the holding in this case would be one to which the Act of 1881 would apply; and therefore the landlord must show some existing enactment excluding or withdrawing it from the operation of the principal statute. He relies for this purpose on the 5th section of the repealing Act, which declares that the Land Law Acts, with some trivial exceptions,

(1) 21 I. L. T. & S. J. 67; 18 L. R. Ir. 407.

Appeal. 1899.

GAFFNEY, *Tenant;* FETHERSTON-HAUGH, *Landlord.*

Holmes, L.J.

shall not apply to certain specified tenancies, the last of which is "a tenancy in a holding (other than a holding let to be used wholly or mainly for a dairy farm), which is let to be used wholly or mainly for the purpose of pasture.—(1) If it is of the rateable value of upwards of one hundred pounds; or (2), if the tenant does not actually reside on the holding, or where the holding adjoins, or is ordinarily used with another holding, then on the latter holding."

This provision does not follow the language of the portion of the 58th section of the earlier Act that related to pasture farms. It is a new enactment taking the place of an old one that is expressly repealed; and *prima facie*, its language must be regarded as referring to the period when it first became law. It seems to me to follow from *Nelson* v. *Headfort* (1), that the residence on the holding, and the ordinary user mentioned in the new provision, are residence and user, on the 14th August, 1896, the date when the last statute received the Royal Assent. No doubt that enactment was intended to amend the previous statutes; and in some of its provisions the amendment is made to speak as if it formed part of the Act amended. But this is not what has been done by the 5th section. That section is a new declaration of rights and contains within its own limits no reference to previous legislation. How then am I at liberty to construe it as if it purported to be an enactment of the year 1881? Mr. Ronan has called attention to the fact that the whole of the 58th section has not been repealed, and that even portion of one of its sub-sections is left standing. But it will be seen that what is unrepealed deals with a separate and distinct subject-matter; and, therefore, this circumstance affords, in my opinion, no assistance in construing the new provisions which seem to be independent and complete in themselves. The only other section of the Act of 1896 that has been referred to in support of the contention of the landlord is the 50th. The 3rd sub-section thereof provides that Parts 1 and 2 of the new Act shall be construed as one with the Land Law Acts; but this does not amount to a declaration that all the Acts are to be assumed to be of the same date. The 3rd sub-section has also

(1) 21 I. L. T. & S. J. 67; 18 L. R. Ir. 407.

been relied on; but it deals with a different matter, and throws no light upon the point under consideration.

Applying the construction which was given, in *Nelson* v. *Headfort* (1), to language in an Act of 1881 to similar language in an Act of 1896, I am of opinion that the tenant is entitled to have a fair rent fixed.

Solicitor for the tenant: *P. J. Nooney.*
Solicitor for the landlord: *E. E. Mason.*

G. Y. D.

IN RE GREENE, A BANKRUPT (1).

Bankruptcy—Practice—Sale by Court—Consent signed by the assignees and mortgagee for sale according to the course of the Court—Conditions of sale—Rent and outgoings to be paid up to last gale day preceding the sale—Assignees' account—Proper deductions.

Where property of a bankrupt was mortgaged and a consent was signed by the assignees and mortgagees thereon that the property should be sold according to the course of the Court, and the net proceeds of the sale should be distributed under the order of the Court, and the conditions of sale provided that the rent and other out-goings should be paid up to the last gale day preceding the sale, the amount of rent due up to the last gale day, and the municipal and non-municipal rates, are proper debits against the proceeds of the sale, and should not be charged against the general estate of the bankrupt.

ROBERT GREENE, the bankrupt, was entitled under lease dated the 29th May, 1890, to the houses 11 and 12, North Earl-street, Dublin, for the term of ninety-nine years, subject to the rent of £160 a-year, payable half-yearly on every 25th March and 29th September. He was also entitled, under lease dated the 13th October, 1896, to the houses 14 and 16, Nottingham-street, Dublin, for the term of 150 years, subject to the rent of £6 6*s.*, payable

(1) 18 L. R. Ir. 407.
(2) Before LORD ASHBOURNE, C., and FITZGIBBON and HOLMES, L.JJ.

Appeal. 1899. *In re* GREENE.

every 1st May and 1st November. These premises had been mortgaged by the bankrupt, together with three policies of insurance on the life of the bankrupt, to Edward Egan, by deed dated the 14th March, 1898. Robert Greene presented a petition for arrangement on the 23rd May, 1898, but he was adjudicated bankrupt on the 19th July, 1898. By a consent dated the 29th July, 1898, which was afterwards made a rule of Court in the bankruptcy matter, it was agreed that the interest of the bankrupt his assignees and mortgagees in the premises should be sold according to the course of the Court, and that the net proceeds of the sale should abide the rights of the parties to be determined by charge, or otherwise as the Court should direct. By the conditions of sale it was provided that the vendors should pay all rent, rates, and taxes, down to the gale-day preceding the sale. Business had been carried on in the premises in North Earl-street from the 23rd May, 1898, to the 4th August, 1898.

The premises were sold on the 6th September, 1898, and realized along with the three policies of insurance on the life of the bankrupt a sum of £1260. On the 21st October, 1898, Edward Egan, the mortgagee, filed a charge claiming to be entitled to have the proceeds of the sale applied *pro tanto* to discharge his debt and to prove on the estate for the balance remaining unpaid. There was due to the mortgagee for principal and interest £1623 7*s.* 9*d.*

In the assignee's account there was charged against the mortgagee £71 5*s.* 10*d.* for rent down to the 25th March, 1898, and £15 2*s.* 4*d.* for municipal, and £29 13*s.* 8*d.* for non-municipal taxes: a sum of £1 was also charged for contract water-rate.

When the case came before the Chief Registrar for vouching the mortgagee's account, he ruled that the sum of £44 16*s.* 1*d.*, the amount of the municipal and non-municipal rates, should be debited against the general estate of the bankrupt, and not against the mortgagee. On appeal to the Court, Boyd, J., on the 4th July, 1899, made an order reversing the ruling of the Chief Registrar, and directed that the rates should be charged to the mortgagee's account. At the same time an application was made by the mortgagee that the sum of £75 9*s.* 2*d.* allowed in the mortgagee's account for rent should be debited against the general

estate. This application was refused by Boyd, J., on the 4th July, and from that order the mortgagee appealed.

Blood, Q. C., for the appellant:—

The rates were a mere personal liability not chargeable against the mortgagee, for which the person in possession alone was liable. The municipal rates at that time were payable on the 1st January and 1st July, and the remedy for non-payment would have been against the bankrupt personally, or by distress against the goods on the premises. The rent was the gale due up to March, 1898; that was prior to the adjudication, and is not chargeable against the mortgagee. These items ought to be paid out of the general estate of the bankrupt.

Robert Doyle, for the assignees:—

We rely on the consent of the 29th July, 1898, and the conditions of sale. If the mortgagee had sold out of Court he would have had to clear all the outgoings up to the gale-day preceding the sale.

LORD ASHBOURNE, C.:—

This is a short and interesting case depending on a very few facts. It is an appeal by Mr. Blood's client against a ruling of Boyd, J., in the Bankruptcy Court, Queen's Bench Division, and it seeks to question his ruling with respect to some items in the account of the Official Assignee.

It appears that Robert Greene, a trader, trading as Jackson & Co., was adjudicated bankrupt on the 19th July, 1898. At the date of the adjudication, Egan, Mr. Blood's client, was a mortgagee of the property of the bankrupt, and he elected to stand on his security, as was his perfect right to do, and he did not come in and prove in the bankruptcy. Then he decided, for his own interests, to sell the property comprised in his security, and did more than that, he availed himself of the machinery of the Court of Bankruptcy to carry out the sale. He considered that the best course for his own interest, and proceeded to sell according to the practice of the Court—a proceeding which has opened up the whole controversy. He entered into a consent or contract with the assignees,

Appeal. 1899. *In re* GREENE. Lord Ashbourne, C.

which stated that the sale should take place "according to the course of the Court," and that when the sale was completed the "net proceeds" were to be brought in and dealt with. The conditions of sale provided that out of the "net proceeds" the rent and taxes should be satisfied, in order that the purchaser might go into possession of the premises free from arrears of rent. In due course the money came into Court, and Mr. Maconchy, the Official Assignee in charge, made these payments. When it ultimately came before Boyd, J., there were three items in controversy.—£15 2*s.* 4*d.*, the municipal rates; £29 13*s.* 8*d.*, the non-municipal rates; and £71 5*s.* 10*d.*, the half-year's rent of the premises, and the question was, whether these items had been rightly brought into this account or not, and were they rightly taken as deductions or not? Boyd, J., decided that, according to the settled practice of the Court—what is called the course of the Court—it was proper to make these deductions, as from the proceeds of the sale of a specific security, which Mr. Egan elected to sell according to the course of the Court. I do not think that that is an unreasonable course; it does not deprive Egan of any of his rights. It only allows these payments against the money, which represented a particular fund, and it is open, I believe, to Egan to come in and get a dividend upon the unpaid portion of his debt along with the other creditors, and his claim as a general creditor will be regulated, having regard to the deductions made for the particular items.

In my opinion the decision of Boyd, J., was right, and should be affirmed, and the appeal dismissed with costs.

FITZ GIBBON, L. J.:—

I concur with the Lord Chancellor: it requires a little consideration to understand the legal position of the parties. In my view, bankruptcy law has nothing to do with it. We have to deal with the account rendered by Mr. Maconchy of the proceeds of the sale of property which he was called upon to turn into money. There are, in point of law, three distinct parties—first, the mortgagor of the property, the bankrupt, represented by his assignees; secondly, the mortgagee Egan; and, lastly, Mr. Maconchy, in his capacity of agent for the sale. For the purpose of effecting this sale the mortgagee signed a written agreement,

consenting that Mr. Maconchy should carry it out according to the course of the Court, which must be taken as known to the parties. It is not denied that rent and taxes are usually paid out of the proceeds of a security such as this, when the mortgagee elects to sell through the Court. If, instead of so selling, the mortgagee had sold out of Court, he must have employed an independent agent, he must have paid a larger poundage, and possibly he might have got a smaller price. But in any case he would have had to indemnify the purchaser from the claims for rent and taxes which Mr. Maconchy paid, and all he could have got would have been the purchase money less by those payments. Whatever amount of the mortgage debt remained due, after applying the net proceeds in part payment, would have been a debt payable by the mortgagor out of his general assets. What is the amount of money which Mr. Maconchy now has in hand as the "net amount" of the proceeds of the sale? Every penny which, if paid by an ordinary agent, would have been a good credit for him, against the purchase-money, or against his employer, is now a good deduction from the purchase-money for Mr. Maconchy. The credit that the mortgagor gets, as against his debt, is the net amount which has come to the hands of the mortgagee in part payment, as having been realized out of the security. The mortgagee remains an unsecured creditor for the rest of his debt. Therefore the true position is that the net amount, after payment of the rent and taxes, and no more, has been realized by Mr. Maconchy, as agent for the mortgagee in the sale: all the rest remains to be proved by the mortgagee as a general creditor, and is an unsecured debt on which he must rank for dividend only. It has been suggested by Mr. Blood that the rates should have been paid out of the general assets. I admit that they were recoverable, and might have been paid out of the general assets. If they had been so paid, they could not have been got back, nor charged against the mortgagee; but they were not so paid, because Mr. Maconchy in fact paid them out of the deposit, and he did not mix up the general assets with the particular fund of which he has rendered the account now before us, and as against the mortgagee, they are a good credit, in ease of the purchaser, under the conditions of sale, against that fund. There is one small item — namely, the £1 for "contract water-rate" — which was

Appeal. 1899. *In re* GREENE. Fitz Gibbon, L.J.

possibly not properly payable out of the premises. I am inclined to think that this is, legally speaking, the price of water supplied on a personal contract; but this is left in doubt, and has not been made the subject of any distinct argument. The difference between disallowing it, and including it in the balance to be proved as an unsecured debt, would only be some 8*s.*; it is not worth mentioning in our order, and I refer to it only lest we should be supposed to decide that contract water-rate is a proper deduction from the price of premises sold by a mortgagee.

HOLMES, L. J.:—

There is no doubt that if the mortgaged premises had not been sold the municipal and other rates due at the date of the bankruptcy would have been paid in full, as a preferential charge, out of the bankrupt's general estate; and at first sight it seems anomalous that the result of the sale has been to throw this liability on the mortgagee. But the reason for this becomes clear when his position is considered. His mortgage was not affected by the bankruptcy. He was at liberty to select such time and manner of realising his security as appeared to him to be best in his own interest. If he had sold out of Court, as he might have done, he would have had conditions of sale prepared by a solicitor or house-agent, one of which would probably have provided that the vendor would clear the premises from rent, rates, and taxes up to the time of sale, or to some other appointed date. In such case these liabilities would have been paid out of the purchase-money; and if the surplus had been insufficient to discharge the mortgage debt, he would have been entitled to prove in the bankruptcy for the balance, and to receive the same dividend thereon as the other creditors. He would not, however, have been entitled to claim in full from the bankrupt's estate the rent, rates, and taxes which he had paid pursuant to his conditions of sale. The priority given by the Act 52 & 53 Vict. c. 60, to parochial and other rates in the administration of a bankrupt's estate is, as I understand the law, a priority in favour of the authority to whom the rates are payable, and cannot be claimed by a third party, who for his own interest or convenience, or for any other reason, pays them voluntarily. So also the power which a landlord may have through his right to

Appeal. 1899. *In re* GREENE. Holmes, L.J.

distrain of obtaining from the bankrupt's estate a half-year's rent in full is not transferred to a person who, by payment of the rent, has made a distress impossible. Now if this would have been the position of the mortgagee if he had sold out of Court, how is it altered by what happened in this case? He consented to the mortgaged premises being sold under the direction, and according to the usual course, of the Court.

The assignee prepared the conditions of sale containing a stipulation similar to what I have suggested would have been inserted by a solicitor or house agent, and in accordance with what has been the ordinary practice of the Court. When the purchase-money was received the assignee discharged thereout the rent and rates due, as well as the costs of sale, just as a house agent would have done, and the surplus was payable to the mortgagee. His security was thus exhausted, and if a balance of the mortgage debt is still due, he must prove for it as any other creditor.

Solicitors for the mortgagee: *V. B. Dillon & Co.*
Solicitor for the assignees: *Eugene F. Collins.*

R. D. M.

IN RE ELLIOTT (1).

Q. B. Div. Bankruptcy. 1900. March 13.

Bankruptcy—Married woman—Judgment—Debtor's summons—Practice.

Where a judgment has been obtained against a married woman, in accordance with the form laid down in *Scott* v. *Morley* (20 Q. B. D. 120), the judgment debtor cannot be adjudged a bankrupt on a debtor's summons, issued on foot of the judgment.

THE facts of this case, so far as material to the question raised, and the authorities cited, are fully referred to in the judgment of Boyd, J.

Ignatius O'Brien, Q. C., for Mrs. Elliott, the judgment debtor.

Serjeant Dodd and *Drumgoole*, for the petitioning creditor.

(1) Before BOYD, J.

Q. B. Div. 1900.

In re Elliott.

Boyd, J.

Boyd, J. :—

The application in this case is to set aside the adjudication which has been made against the debtor, on the non-compliance by her with the requirements of a debtor summons, which had been served upon her.

The debtor summons required the debtor to personally pay the amount of a judgment obtained against her.

The debtor is a married woman, and the said judgment was obtained against her in accordance with the form in such case, as settled in the case of *Scott* v. *Morley* (1), whereby it was "adjudged that the plaintiff do recover" the amount and costs, "such sum and costs to be payable out of her separate property, as hereinafter mentioned, *and not otherwise.*"

Notwithstanding the restrictive form of the judgment, the creditor in this case caused the debtor summons to be issued out of this Court, whereby she was required personally to pay the amount so recovered by him. In other words, by the issue and service of such debtor summons he sought to convert his claim against the debtor under the judgment, which was only a claim against her property, into a personal claim.

In my opinion he had no right to do so, and the adjudication which has been founded on such debtor summons must be set aside. Several cases have been decided in the English Courts, under provisions in the English Bankruptcy Acts, similar to the provisions as to a debtor summons in the Irish Act: *In re Hannah Lynes; Ex parte M. Lester & Co.* (2); *In re Hewett; Ex parte Levene* (3); *In re Frances Handford & Co.; Ex parte Frances Handford* (4). On the authority of these cases I allow the cause shown against the adjudication in this case.

Solicitor for Mrs. Elliott: *Moran.*

Solicitor for the petitioning creditor: *Russel.*

J. MAC M.

(1) 20 Q. B. D. 120.
(2) [1893] 2 Q. B. 113.
(3) [1895] 1 Q. B. 328.
(4) [1899] 1 Q. B. 566.

FEGAN *v.* MEEGAN (1).

(1898. No. 7994.)

Q. B. Div.
1899.
June 7, 10.

Marriage articles—Informal contract—Interest whether absolute or for life only.

By an inartificially drawn agreement not under seal, and described as "marriage articles," made between A and B (his son), both marksmen, and C and D (C's daughter), reciting an intended marriage, afterwards duly solemnized between B and D, and in further consideration of £70 to be paid by C to B as D's marriage portion, A assigned all his interest in a farm of land (treated during the argument as a chattel real), the property of A, to B and D, their heirs and assigns, after the death of A, with remainder to the children of the intended marriage, after the death of B and D; and in case D should survive B, A and B transferred and made over the farm to D "during the term of the natural life of the said D."

There were no children of the marriage. D survived A and B.

After the death of A, B and D, the plaintiff in the present action, who was personal representative of A and B, brought this action to recover possession from the legatee of D:—

Held, that D was entitled to a life interest only, and that the verdict which had been directed for the plaintiff at the trial should stand.

MOTION on behalf of the defendant that the verdict for the plaintiff at the trial of this action and the judgment entered in this action should be set aside to the extent hereinafter mentioned, on the ground of misdirection by the learned Judge, and that a verdict and judgment might be entered for the defendant for 19A. 1R. 30P., part of the lands of R. Taafe's holding, being part of the lands claimed in this action.

This was an action brought to recover possession of 19A. 1R. 30P. part of the lands of R. Taafe's holding, and also of other lands with which this motion does not deal. The action was tried before the Hon. Mr. Justice Kenny and a jury on the 25th of February, 1899, when the following facts appeared. The lands in dispute

(1) Before JOHNSON, MADDEN, and BOYD, JJ.

Q. B. Div. 1899.

FEGAN v. MEEGAN.

were formerly in the possession of one Edward Lennon, and on the occasion of the marriage of his son Laurence to Mary Callan, an informal document, called "Articles of Agreement," was executed. It was dated the 7th of January, 1860, and made between Edward Lennon of the first part, Hugh Callan of the second part, Laurence Lennon of the third part, and Mary Callan of the fourth part. It recited the intended marriage, and that Hugh Callan bound himself to pay to Laurence Lennon the sum of £70, as a marriage portion for his daughter Mary, and witnessed that "in consideration of the said sum of £70 sterling to be paid as aforesaid the said Edward Lennon doth hereby for him, his heirs and administrators, sell, assign, transfer, and for ever make over, unto the said Laurence Lennon and the said Mary Callan his intended, their heirs and assigns, all his the said Edward Lennon's right, title, and interest, claim, possession, and demand whatsoever of, in, or to" [then followed a description of what was assigned, including the above mentioned 19A. 1R. 30P.], "after the decease of the said Edward Lennon"; then followed a remainder to the children of the marriage after the death of Laurence and Mary, and the agreement proceeded, "and in case the said Mary Callan shall survive or be living after the decease of the said Laurence Lennon, the said Edward Lennon and the said Laurence Lennon, doth hereby for them, their heirs and administrators, transfer and make over to the said Mary Callan" [then followed a description of the property, including the 19A. 1R. 30P]. "during the term of the natural life of the said Mary Callan."

The marriage was duly solemnized, and there was no issue thereof. Edward Lennon died intestate on the 7th of April, 1861. Laurence Lennon died intestate on the 19th of October, 1888, and Mary Lennon died on the 17th of July, 1895. The lands in dispute were held under a yearly tenancy. The plaintiff was administratrix of Edward Lennon and of Laurence Lennon, and contended that upon the death of Mary Lennon there was upon the true construction of the articles of agreement a resulting trust in favour of Edward. The defendant claimed the lands as devisee of Mary Lennon. The learned Judge at the trial held that there was a resulting trust in favour of Edward, that Mary only took

a life estate in the lands, and that the plaintiff was entitled to recover possession of the lands. He so directed the jury and gave judgment for the plaintiff.

D. S. Henry, Q.C., and *T. L. O'Shaughnessy, Q.C.* (with them *John Donaldson*), for the defendant:—

We contend that the property vested in Laurence and Mary Lennon, as joint tenants. The earlier clause in the instrument must prevail over the later. The words vesting the property in Laurence and Mary are clear. The grant is executed. The settlor is his own conveyancer. The meaning of the last clause is that the husband guarantees his wife's life estate, as in *Duberly* v. *Day* (1). Even if the instrument is executory, still it is clear that the ultimate remainder should be to the husband and wife as joint tenants. [They referred to *Re Hoban* (2).]

T. S. M'Cann (with him *Serjeant Dodd*), for the plaintiff:—

Where you have an inartificial document in which the parties have used expressions which they did not understand you cannot apply the same strict canons of construction as to a deed drawn by a lawyer: Elphinstone on the Interpretation of Deeds, p. 78. We rely on a resulting trust in favour of Edward. If the first clause stood alone the husband and wife took clearly a grant in fee as joint tenants. But the provision for the children shows an intention to cut down the fee, and we contend that the last clause is put in also with the intention of cutting down the absolute interest in the wife to a life interest, leaving a resulting trust for the settlor.

Cur. adv. vult.

June 10.

JOHNSON, J.:—

This is a motion on behalf of the defendant to set aside the verdict directed and judgment entered for the plaintiff by Mr. Justice Kenny, on the trial of an ejectment on title for a holding of about 19 acres (Irish) of land in the county of Louth, of which about 3½ acres are of freehold tenure, and the residue held under

(1) 16 Beav. 33. (2) [1896] 1 Ir. 401.

Q. B. Div. 1899.

FEGAN v. MEEGAN.

Johnson, J.

a contract of tenancy from year to year, and to enter judgment for the defendant.

The question for decision is whether, on the true construction of the instrument of the 7th January, 1860 (described as "articles of agreement"), and in the events which have happened, Mary Lennon (otherwise Callan) under whom the defendant claims, had any greater interest in the holding than an estate for her own life. This instrument, which is not under seal, was made and signed by the parties to it in contemplation of a marriage then intended and which shortly afterwards took place between Laurence Lennon and Mary Callan: it is informally drafted; the parties to it are—1, Edward Lennon (a farmer—a marksman, and father of Laurence Lennon, the intended husband); 2, Laurence Lennon (also a marksman); 3, Hugh Callan, father of the intended wife; and 4, Mary Callan, the intended wife. It recites the intended marriage: that Edward Lennon was seized and possessed of this holding, and also possessed of chattel property, furniture, and effects: and that Hugh Callan, if the marriage took place, intended to give Laurence Lennon (the intended husband) as a marriage portion with his daughter £70, of which £35 was to be paid on the marriage, and the remaining £35, twelve months from the marriage, if the wife was then living. There is no other recital. This instrument then witnesses that "in consideration of £70 to be so paid, said Edward Lennon doth hereby for himself, his heirs, and administrators, sell, assign, transfer, and for ever make over to said Laurence Lennon and Mary Callan, his intended wife, their executors, and assigns, all his said Edward Lennon's right, title, and interest, claim, possession, and demand whatsoever of, in, or to," (this holding), "and also his chattel property, furniture, and effects as aforesaid *after the decease of said Edward Lennon.*" So far this instrument was effectual as an agreement by Edward Lennon to grant all his interest in the holding to Laurence Lennon and his then intended wife (if the marriage took place) as joint tenants, subject to the life interest of Edward Lennon himself. The instrument then goes on to provide that if there should be issue of the marriage, the "children should have the aforesaid estate and property or chattels after the decease of said Laurence and his wife." No express provision is made for the event

of the marriage being childless (which happened), or of the wife predeceasing her husband (which did not happen), but in those events the husband as surviving joint tenant would have been absolutely entitled to the holding. Express provision is, however, made for the event of the husband predeceasing his wife (which did happen); in that event Edward Lennon and his son Laurence for them, their heirs, and administrators, make over the holding, &c., to the wife *for and during the term of her natural life.* The marriage took place—there was no issue; Edward Lennon died intestate in 1861; Laurence Lennon (who with his wife was in possession of the holding from the death of Edward Lennon) died intestate in 1888. Thenceforth his widow, Mary, continued in possession until her death in 1895; the defendant claims under her; the plaintiff is the administratrix of Edward Lennon, and also of Laurence Lennon. Who may be heir-at-law of Edward or Laurence Lennon is not (so far as I can see) proved; but the argument has proceeded on the assumption that for the purpose of the present decision the tenure of the entire holding is to be treated as a chattel interest.

For the defendant, who claims through Mary Lennon, it is contended (as I understand) that this final provision in the instrument of January, 1860, was merely intended to estop the husband by his own covenant from any dealing *inter vivos* with the interest in this holding, by virtue of his marital right, in any manner which might interfere with or prevent his wife (if she survived him) enjoying at all events a life interest in the holding, and that as he did not deal with the interest in the holding in his lifetime, and left her surviving, this final provision did not come into operation, and she, therefore, as surviving joint-tenant, became on her husband's death absolutely entitled to the holding under the earlier limitation.

For the plaintiff, who claims through Edward Lennon and also through Laurence Lennon, it is contended, as I understand, that this final clause in the instrument of the 7th January, 1860, is an unambiguous and definite provision that in the events which have happened, viz. failure of issue of the marriage, and the husband predeceasing his wife, she should have an interest in the holding brought into settlement by Edward Lennon for and during the

Q. B. Div. 1899.

FEGAN v. MEEGAN.

Johnson, J.

term of her natural life, and no longer, and that the plan of the settlement and the object and intention of the parties to it, to be gathered from the terms of the instrument itself and the source of the property agreed to be settled is that Edward Lennon the settlor should have the holding and chattels during his life with remainder to the intended husband and wife as joint tenants, with remainder after the death of the survivor to the child or children of the marriage (if any) with remainder in default of any child of the marriage to the husband, absolutely, if he survived his wife; but if she survived him, then to her "for and during the term of her natural life"—thus leaving the ultimate interest in the holding, subject to her life interest, undisposed of by the instrument, and which therefore resulted to the settlor, on the ordinary ground that when property is put, or agreed to be put, in settlement on an intended marriage, and no provision is made for its ultimate destination, when the provisions of the settlement fail or are satisfied, the property brought into settlement by, or on behalf of the husband, and not otherwise disposed of, results to the settlor or his representatives.

I think this contention for the plaintiff is right; and that, informal as the drafting of this instrument may be, it is clear at all events in this, that the parties agreed and intended that if there was no child of the marriage, the wife, surviving her husband, should have an interest for her life in the property brought into settlement on behalf of her husband, and that life interest only.

I, therefore, think the verdict was rightly directed for the plaintiff, and that the judgment for the plaintiff should be retained.

MADDEN, J.:—

I am clearly of opinion that the instrument before us is executory in its character. It is not under seal, and is described as "articles of agreement." These circumstances are not conclusive in themselves, but when I turn to the agreement itself, I find that it presents all the characteristics of an executory instrument. The parties to it, so far from being their own conveyancers, have afforded us very scanty indications of the trusts

which ought to be inserted in it. In substance the settlor, the father of the intended husband, in consideration of the marriage, and of the wife's fortune paid to his son, dedicates certain property to the trusts of the settlement, the objects of the settlement being the intended husband and wife and the children of the marriage, reserving, however, a life-estate for himself. So far as the interest of the settlor in this property is not exhausted by the trusts of the settlement it remains in him, either by way of resulting trust, or by force of an express limitation, supposing the articles to be formally carried out by the execution of a formal settlement. If this was done the trusts would, I think, be those indicated by my brother Johnson, J. It is, at all events, clear that the interest of the wife in the settled property in the events which have happened would have been one for her life. It is also clear that no conveyancer would carry out the agreement by creating a joint tenancy in husband and wife.

Mr. Henry argued ingeniously that the clause in the agreement giving a life-estate to the wife, was intended to capture the life-estate of the settlor, and also to prevent the husband from defeating it by severing the joint tenancy which he assumes to have been created. As to the former suggestion I think it clear that the entire settlement was to be subject to a life-estate reserved to the settlor. As to the latter, I think it assumes too much. The agreement is inartificially drawn, and betrays ignorance of the meaning of the most ordinary legal terms. I read the prefatory words of the clause dealing with the wife's life-estate as an informal way of saying what a conveyancer might have expressed by the words, "it is hereby declared, and agreed by and between the parties to these presents." It is, at all events, clear that what the wife was to get, in the event with which this clause was conversant, was a life-estate only.

BOYD, J., concurred.

Solicitor for the plaintiff: *C. Mac Mahon.*
Solicitor for the defendant: *R. Dickie.*

J. M^cG.

Appeal.
1899.

O'CONNELL *v.* HOLLAND (1).

Nov. 8.

Parliament—Franchise—Inhabitant householder—Compulsory absence during part of the qualifying period—Militia sergeant—Imprisonment—Confinement to camp for military offence—54 Vict. c. 11.

A sergeant in a militia regiment, ordinarily resident in Londonderry, while on training with his regiment at Buncrana, was sentenced to be a prisoner at large for forty-eight hours on a charge of drunkenness. The effect of the sentence was that he was not allowed outside the camp lines during the period.

Held, that he was not thereby disqualified as an inhabitant occupier in respect of his residence in Londonderry.

Appeal by Daniel O'Connell against the decision of Mr. Moriarty, one of the Assistant Revising Barristers for the Borough of Londonderry, declaring the appellant not entitled to the franchise.

The facts appear from the case stated, which was as follows:—

At a Court held by me, etc., etc., the name of Daniel O'Connell appeared on the Town Clerk's List No. 17 of Parliamentary Voters for the West Division of the Borough of Londonderry, as follows:—

No.	Surname and Christian Name.	Place of Abode.	Nature of Qualification, whether Rated Occupier, or Inhabitant Householder.	Name or Description of Premises rated, Street, Lane, or other like place in this Borough, and Number of the House (if any) where the Property is situate.	Rated Value of Premises. £ s. d.
1366	O'CONNELL, DANIEL.	Nailor's Row.	Inhabitant Householder.	House and yard, Nailor's Row, in succession from two rooms top flat, 41 Nailor's Row, and upper part of 24 Walker's Place.	

and was duly objected to.

(1) Before Sir P. O'Brien, L.C.J., and Fitz Gibbon and Holmes, L.JJ.

It was proved in this case that this man, who is a sergeant in the Derry Artillery Militia, was during the qualifying period and while his regiment was stationed at Buncrana for training, duly tried for drunkenness, and sentenced to be a prisoner at large for forty-eight hours. I inquired from him what the effect and meaning of being a prisoner at large was, and he told me, that it meant he was not allowed to be, and, in fact, was not outside the limits of the camp lines at Buncrana during the said period of forty-eight hours, and that it was as if the regiment was in barracks instead of being under canvas and he had been confined within the walls of the barracks for the same period. I was of opinion that it was the same thing as if he had been confined within the walls of Derry Jail, and I accordingly struck out his name.

Except as aforesaid the said Daniel O'Connell was in all other respects duly qualified to be registered as an inhabitant householder.

If I was wrong in so deciding his name is to be restored to the register of voters.

Healy, Q.C., and *P. Walsh*, for the appellant.

Cooke, Q.C., and *Osborne*, for the respondent.

The following cases were cited:—*The King* v. *Mitchell* (1); *Powell* v. *Guest* (2); *Ford* v. *Hart* (3); *Donnelly* v. *Graham* (4); *Criglington* v. *Gallagher* (5); *M'Carron* v. *Chambers* (6); *Holland* v. *Hagan* (7); *Charlton* v. *Morris* (8).

SIR P. O'BRIEN, L. C. J.:—

This case is a very short one, and is succinctly stated by Mr. Moriarty. The first paragraph of the case contains all the relevant facts, so I shall read it:—"It was proved in this case that this man, who is a sergeant in the Derry Artillery Militia, was during

(1) 10 East, 511.
(2) 16 C. B. (N. S.) 72.
(3) L. R. 9 C. P. 273.
(4) 24 L. R. Ir. 127.
(5) 26 L. R. Ir. 134.
(6) 28 L. R. Ir. 294.
(7) [1895] 2 I. R. 551.
(8) [1895] 2 I. R. 541.

Appeal, 1899.

O'Connell v. Holland.

Sir P. O'Brien, L.C.J.

the qualifying period, and while his regiment was stationed at Buncrana for training, duly tried for drunkenness, and sentenced to be a prisoner at large for forty-eight hours. I inquired from him what the effect and meaning of being a prisoner at large was, and he told me that it meant he was not allowed to be, and in fact, was not outside the limits of the camp lines at Buncrana during the said period of forty-eight hours, and that it was as if the regiment was in barracks instead of being under canvas and he had been confined within the walls of the barracks for the same period."

Now these are the facts, and but for some expressions in some of the decided cases, I would have no difficulty whatever in deciding the present case. Mr. Moriarty decided against the vote, because it appeared to him that there was a twofold cause of absence, namely, confinement to the barracks at Buncrana for forty-eight hours, and the performance of duty arising from and incident to his services as a militiaman. He held that having regard to the word "only" in the second section of the Electoral Disabilities Removal Act of 1891, O'Connell was not within the protection of that section. We think, however, that he was within the protection of the section, because the real efficient cause of his absence was that he was in the militia, that the real ground of disqualification which would have existed would have been the absence caused by his having been in the militia, and that the disqualification which would have arisen from that cause is prevented by the second section of the Act. I think the Act of Parliament was intended, though not very clearly expressed, to cover militia service and all its incidents, and that it was an incident of the service that O'Connell was a prisoner at large for forty-eight hours. The Act, I think, intended that the time limit not having been exceeded, service in the militia, and its consequences, were not to disqualify. For my own part, but for some expressions in the cases, I should have no difficulty at all in the case; I should have not the smallest difficulty in holding that being a prisoner at large for forty-eight hours did not operate as an interruption of the continuity of the man's inhabitancy. The decision in *M'Carron* v. *Chambers* (1)

(1) 28 L. R. Ir. 294.

seemed to me to be very good sense, and I am glad to see the Scotch Judges took the same view in the case of *Watt* v. *M'Guire* (1). I think O'Connell's name should be restored to the register.

FITZGIBBON, L.J. :—

Mr. Healy, in opening this appeal, unceremoniously described the decision as "the apex of absurdity." I am still afraid, as I was in *Holland* v. *Hagan* (2), that we are *inter apices* on this question, but in this case I am glad to be able to remain there, and not to take "Excelsior" as my device. I hold that the claimant is, upon the facts stated, protected from this disqualification by the Electoral Disabilities Removal Act, 1891, because he was absent from his dwelling-house during the forty-eight hours in question, by reason only of the performance of a duty incidental to his service in the militia. I must disclaim the caricature of this conclusion, which may be put in the form of saying that it treats his drunkenness as a performance of his duty. We have to do, not with his offence, but with his absence from his dwelling-house. While stationed at Buncrana, in camp for training, he was "duly tried for drunkenness, and sentenced to be a prisoner at large for forty-eight hours," which "meant he was not allowed to be outside the limits of the camp lines, at Buncrana, during the said period of forty-eight hours." It seems to me that his crime and its punishment were both incidental to his service as a militia man. Had he not been a militia man in training, simple drunkenness would not have been punishable at all. Had he not been a militia man, being a prisoner at large would have been an impossible punishment. If the training had come to an end during the forty-eight hours, he could have gone home at once. By military law it is expressly provided that breaking the obligation which kept him within the limits of the camp lines, would have been an offence for which he might have been punished by *imprisonment, i.e.* by actual confinement, either in a military prison, or, upon a proper committal, in a gaol. But the effect of the sentence actually passed seems to me to be incidental to his service, and to be much the same as the effect upon a schoolboy

(1) 16 R. 263. (2) [1895] 2 I. R. 551.

Appeal. 1899.

O'Connell v. Holland.

Fitz Gibbon, L.J.

of an order by his master not to go "out of bounds." Common sense is satisfied by holding that, when a man is really kept away from his dwelling-house by an obligation thus incidental to his duty, he is not to be disqualified. Were we to hold otherwise, the most absurd consequences must follow. Every militiaman who, for any period of time exceeding a single day, has been ordered not to go beyond any limits which his commanding officer may fix, as a punishment for any transgression of military rule, would be disqualified, although if he had never been subject to such a restriction, he nevertheless must still have remained for a very much longer period absent from his dwelling. Would a sailor sent to the cross-trees for untidiness be disqualified, when his comrade sent to the crow's nest as a look-out would not? I am willing to go so far as to say that in my opinion the true question is: Could he have gone home to his dwelling-house without violating any duty arising from or incidental to his service? I can not believe that the Act of 1891 leaves it open to objectors to search out every case in which some further restraint has been, by military or naval authority, put upon a man who is in any case compelled to be absent from his qualifying dwelling-house. Drunk or sober, "prisoner at large" or well conducted, in no case could Daniel O'Connell have gone home during the forty-eight hours in question, because he was a militiaman, and therefore I hold that he was not disqualified.

But I guard myself against a construction of the Act which, in my opinion, ignores the word "only," by holding that, during the whole period fixed for his absence on duty, a militiaman, or any one else within the Act, is a "chartered libertine," who cannot render himself subject to disqualification by incurring an independent and additional compulsion to be absent from his home. Such a construction seems to me to lead to absurdities in the opposite direction. A militiaman and a civilian assault each other, or join in a robbery, or in any other crime. Both are arrested by the police, both are tried by the civil power, and both are sentenced to three months imprisonment in the common gaol. I decline to hold that the civilian will be disqualified, and that the militiaman will not, if he can prove that, if he had not been in the gaol, he would have been in the camp or in

the barracks; or that whether he is disqualified or not is to depend upon whether the periods of the military service which he ought to have performed, and of the imprisonment which he actually suffered, were or were not conterminous. If a militiaman spends his time in gaol for a civil crime, it seems to me an abuse of words to say that, because he ought to have spent that time under arms, it was by reason "only" of the performance of a duty arising from or incidental to his service that he has been absent from his home, or has been where he was, namely, in gaol.

HOLMES, L.J. :—

Before the passing of the Electoral Disabilities Removal Act, 1891, a person claiming to be registered by reason of occupation would have been disqualified if during part of the qualifying period he was obliged to be absent from his dwelling-house in the performance of a duty arising from, or incidental to, any office, service, or employment undertaken by him. It has also been decided in many cases, that if he were absent from his dwelling-house by reason of imprisonment for an offence committed by him, he would be disqualified. The statute to which I have referred removes the first-mentioned disqualification; but the second still continues.

Hence the question in this case. O'Connell is a militiaman; and by reason of his being so, he was obliged to be in camp and absent from his dwelling-house for three weeks. During these three weeks he was tried and convicted by a military tribunal for drunkenness, and sentenced to what he describes as imprisonment at large for forty-eight hours. This means that the prisoner is not permitted to leave the camp during the prescribed time, although he is at liberty to move about within it, and corresponds to confinement in barracks, when soldiers are living in barracks.

I am unable to distinguish the imprisonment to which O'Connell was subjected from imprisonment imposed by a Civil Court for a statutory offence. The Army Act, 1881, contains a long enumeration of offences, and prescribes the mode of trial and the punishment for each. These offences can only be committed by a soldier, just as offences under other statutes can only be committed by a publican or a servant; but they are

Appeal. 1899. O'Connell v. Holland. Holmes, L.J.

not committed in the performance of a soldier's duty. One of them is drunkenness, the punishment for which is either imprisonment, discharge from the army, reduction in grade, or forfeiture, fines, and stoppages. Neither a courtmartial nor the commanding officer can legally impose any other penalty; and it must be assumed that this man was imprisoned in military custody—one of the only two methods of carrying out a sentence of imprisonment prescribed by the statute. For these reasons I think that the same principle rules this case, as would apply if a militiaman when absent from his house at the annual training was sentenced by the Petty Sessions Court to two days' imprisonment for being drunk and disorderly on a public road. In neither case could it be held that he was imprisoned in the performance of a duty arising from or incidental to his service.

Looked at in this light the point seems to me a difficult one; but I am disposed to think that under the circumstances the man was not absent from his dwelling-house by reason of the imprisonment. If he had not been imprisoned, he would have been obliged to attend to his duties as a militiaman at a distance from his home; and, therefore, I hold, although with much doubt, that during the forty-eight hours as well as for the rest of the time, he was absent therefrom by reason only of the duty arising from his contract of service.

Solicitor for appellant: *Wm. O'Doherty.*
Solicitor for respondent: *F. H. Miller.*

G. Y. D.

BANNON *v.* HANRAHAN (1).

Appeal.
1899.
Nov. 7, 8, 9.

Parliament — Franchise—Inhabitant occupier — Convent — Nuns — Service franchise — Office, service, or employment.

The claimants were nuns residing at a convent in the town of E. Each of them occupied a separate bedroom, and was subject to the control of the Lady Superioress, who could at any time change the occupants from one room to another, or arrange to have more than one occupant of a single room. She could refuse to allow a nun to receive a visitor in her room, demand admission to the room, and require the nuns to give up the keys.

The nuns took their meals together in the Refectory, and occupied in common other general rooms in the convent: they received no remuneration, and were under no contract of employment. The premises were vested in the Roman Catholic Bishop of Clogher, the parish priest, and the senior curate of E., all for the time being, upon trust for the benefit of the Roman Catholic inhabitants of E. The convent was governed by rules subject to the supreme authority of the Bishop:—

Held, that the nuns were not inhabitant occupiers of separate dwellings within the meaning of s. 3 of the Representation of the People Act. *Semble*, the nuns did not occupy their rooms by virtue of any office, service, or employment.

CASE stated by the County Court Judge of the county of Fermanagh. The name of Sister M. Augustine Bannon appeared at No. 114, upon the Local Government Supplement to list No. 12, of the Clerk of the Union of the Unit and Division of Enniskillen, as an inhabitant occupier of part of the convent at Forthill, Enniskillen. The names of seventeen other ladies, whose names were set out in the 1st Schedule, also appeared upon the same list as inhabitant occupiers of parts of the said convent. They were all duly objected to.

By the evidence of Archdeacon Smollen, P.P., it was proved that all these ladies were Sisters of Mercy, and all resided in the convent of their order at Forthill, in the town of Enniskillen.

(1) Before SIR P. O'BRIEN, L.C.J., and FITZGIBBON and HOLMES, L.JJ.

Appeal. 1899.

BANNON v. HANRAHAN.

The premises on which the convent stands were (along with other lands) by deed, dated the 21st January, 1851, vested in trustees, the Roman Catholic bishop of the diocese, the parish priest of Enniskillen, and the senior Roman Catholic curate of Enniskillen, all for the time being, upon certain trusts, which were stated to be—"For the use and benefit of the Roman Catholic inhabitants and congregation of Enniskillen, and for the promotion of the religious and moral improvement, and for the purposes of erecting thereon a Roman Catholic church or chapel, in which the said Roman Catholic inhabitants and congregation may worship, according to the faith and discipline of the Roman Catholic church, and of founding such other bodies, establishments, and institutions, as to the trustees shall seem most conducive to the moral improvement and religious and spiritual benefit and comfort of the said Roman Catholic inhabitants and congregation of the parish of Enniskillen." In exercise of the powers and trusts vested in the trustees, they subsequently built the said convent, and permitted same to be used as a convent of "The Religious Sisters of Our Lady of Mercy."

The convent was governed by Rules, a copy of which was made part of the evidence set out in the case.

These eighteen ladies all resided in the convent during the qualifying period, and each of them had during that period occupied a separate bedroom, but such separate occupation was not enjoyed under any of the Rules above referred to, but only as part of the internal economy of the convent as controlled by its Lady Superioress. The Lady Superioress could at any time change the occupants from one room to another, or arrange to have more than one occupant of a single room. She could also refuse to allow a nun to receive a visitor in her room, and could order her to open the door of her bedroom, if shut or locked, and require her to give up the key of it. The ladies of the convent devote themselves—(1) to works of charity; (2) to teaching; and (3) to the duties of religion, according as they might be directed from time to time by the Lady Superioress.

These ladies take their meals together in the refectory of the convent, and occupy in common other general rooms in it; they receive no remuneration; are under no contract of employment,

nor obligation of any kind, except their obligations as Sisters of the convent and their vows. The government of the convent was vested in the Lady Superioress for the time being, who resided in the convent; the Sisters "execute without hesitation all the directions" she may give, and she is bound to provide for all the necessities of the Sisters, excluding all superfluities. The manner in which ladies become Sisters of Mercy is provided for by the Rules. The latter, however, were silent as to how, if at all, they may be dismissed. Archdeacon Smollen, stated in his evidence, that the supreme authority was in the bishop of the diocese, and that he could admit and dismiss the members according to his own discretion, irrespective of the Rules, but that he would not be justified in doing so. He admitted he knew no instance of the exercise of such a power in the convent at Enniskillen; and he stated he had no knowledge or experience of any other convent. While the County Court Judge accepted Archdeacon Smollen's statements, as made in perfect good faith, they did not appear to him to be made with sufficient expert knowledge for him to act upon, especially so far as they seemed inconsistent with the Rules—and he found as a fact that the admission of the nuns to the convent was governed by the aforesaid Rules.

The mode of election of the Lady Superioress, her tenur of office, the extent of her authority, and certain restrictions upon it were set out in the Rules.

Upon these facts and upon the Rules the County Court Judge found that these ladies were not in point of law inhabitant occupiers of the rooms separately occupied by them respectively, and that, even if in other respects they possessed the qualification, they were nevertheless disqualified by reason that they inhabited the same dwelling-house, as the person under whom they served, viz. the Lady Superioress of the convent. It was contended on behalf of the voter that the real superior was the bishop of the diocese, who resided in Monaghan; and on behalf of the objector, that the ladies did not occupy in right of any service, office, or employment. Having arrived at this conclusion, the County Court Judge expunged all the eighteen names from the list.

Appeal. 1899.

BANNON v. HANRAHAN.

Healy, Q.C., for the appellant, contended, first, that the nuns were inhabitant occupiers; and secondly, that they were entitled to the service franchise.

He referred to the *Bedesman's Case*, *Simpson* v. *Wilkinson* (1); *Baxter* v. *Brown* (2); *Meyler's Case* (3); *Reg.* v. *Mayor of Belfast* (4); *Hudson* v. *Lowth* (5); *Alexander* v. *Burke* (6); *Stribling* v. *Halse* (7); *Wallace* v. *Borrie* (8); *Ballingal* v. *Menzies* (9).

Fetherstonhaugh, Q.C., for the respondent, cited *Hasson* v. *Chambers* (10); *Cruise* v. *Annan* (11); *Monyhan's Case* (12); *Barnett* v. *Hickmott* (13); *Clutterbuck* v. *Taylor* (14).

Nov. 9.

SIR PETER O'BRIEN, L.C.J.:—

The question presented for our determination in this case is one of considerable importance. It is this, namely, whether the Sisters of Mercy who reside at the convent at Forthill in Enniskillen are entitled to be registered as voters for local government purposes. A claim was put forward on their behalf that they were entitled to the Service Franchise under the joint operation of the third section of the Representation of the People Act, 1884, and of the Local Government Act. The former section provides that where a man inhabits any dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment, he shall be deemed for the purpose of this Act and of the Representation of the People Act to be an inhabitant occupier of such dwelling-house as a tenant. This is the section under which the franchise is claimed. The word "man" in that section can be read as "woman" under the provisions of the Local Government Act.

(1) 7 M. & G. 50.
(2) 7 M. & G. 198.
(3) 5 Ir. C. L. R. 54.
(4) I. R. 8 C. L. 423.
(5) I. R. Reg. Ap. 182.
(6) 22 L. R. Ir. 443.
(7) 16 Q. B. D. 246.
(8) [1896] Lawson's Rep. p. 1.
(9) [1897] W. N. 95.
(10) 18 L. R. Ir. 68.
(11) [1897] W. N. 94.
(12) [1895] W. N. 100.
(13) [1895] 1 Q. B. 691.
(14) [1896] 1 Q. B. 395.

It is well settled that there cannot be a *domicilium in domicilio*, and that the same persons cannot have a home within a home, that if one entire structure is the home of several persons these several persons cannot have separate dwellings or separate homes in that entire structure, but recourse is had in this case to sect. 5 of 41 & 42 Vict. c. 26, which provides that the term "dwelling-house" shall include any part of a house when that part is separately occupied as a dwelling. The contention, in fact, is that the bedroom of each sister is "her dwelling," her home. Nothing would more entirely astonish the good, the pious, beneficent, and gentle Sisters themselves than what appears to me the untenable proposition that their bedrooms, which were their mere sleeping-rooms, were their separate "dwellings," their separate houses. The case of *Stribling* v. *Halse* (1) was of course appealed to. *Stribling* v. *Halse* (1), however, even if good law, is clearly distinguishable from the present, for there it was provided that each shop assistant, on behalf of whom the franchise was claimed, was to have a separate room as long as he served the firm in whose employ he was. Each shop assistant seems to have had a contractual right to his room. But there was no appeal in the case of *Stribling* v. *Halse* (1), and in the subsequent case in this country of *Hasson* v. *Chambers* (2) the Master of the Rolls and Lord Justice Fitz Gibbon emphatically dissented from the decision in *Stribling* v. *Halse* (1). No doubt for the sake of uniformity of decision between the two countries Chief Justice May and Lord Justice Barry and Lord Justice Naish followed the decision in that case. It was upheld by a majority of one, Chief Justice May saying in effect he would follow the decision of the English Court, but that if it were *res nova* he would have decided the other way. We have, however, the recent case in England of *Clutterbuck* v. *Taylor* (3), a decision of the Court of Appeal there, which seems to me to be excellent good sense, and to be decisive of the present case. *Clutterbuck* v. *Taylor* (3) is known as the policemen's case. In that case it appeared that a certain policeman had by virtue of his service as a policeman the exclusive occupation of a cubicle in a dormitory at a police station, and in respect of such occupation claimed the

(1) 16 Q. B. D. 246. (2) 18 L. R. Ir. 68. (3) [1896] 1 Q. B. 395.

Appeal. 1899.

BANNON v. HANRAHAN.

Sir P. O'Brien, L.C.J.

same franchise that is claimed here. It was held by the majority of the Court of Appeal that the cubicle was not part of a house separately occupied as a dwelling within the meaning of the Parliamentary and Municipal Registration Act, 1878, sect. 5, and that the appellant was therefore not entitled to the franchise in respect of it under the Representation of the People Act, 1884, sect. 3, the very section which is relied upon here. Lord Esher, in giving judgment, said:—"It appears that the chief constable can order a constable to change his cubicle whenever he pleases. He can order a constable not to receive a visitor or to take his meals in his cubicle and not to go into his cubicle in the daytime. The inspector can order him to open the door and let him in, and the constable can be ordered at any time to give up the key of his cubicle." Lord Esher then asks the question, "Are these incidents consistent with the ordinary ideas of a man's dwelling?" He held they were not, and most emphatically they are not. Well, then, what have we in this case? The learned County Court Judge finds that the Lady Superioress can at any time change the occupants from one room to another or arrange to have more than one occupant in a single room. She can refuse to allow a nun to have a visitor in her room, and can order her to open the door of her bedroom if shut or locked, and require her to give up the key of it.

I put the same question that Lord Esher put. Are these incidents consistent with the ordinary idea of a man's dwelling? In my judgment it is clear that they are not. The learned Judge apparently so held, and I think he was clearly right. Upon this ground I rest my decision of the case. With reference to the other points as to whether the Sisters held an office or were in any service or employment within the meaning of the Act of Parliament, I abstain from giving any final opinion, though it would take something more than I heard at the bar to convince me that the functions discharged by the Sisters, and discharged under no legal contract or trust, were in any way analogous to the office, service, or employment contemplated by the third section of the Act. I am clear that the Sisters did not hold an office or serve under the bishop within the meaning of the section. The bishop stood in a visitorial relation to the Sisters, but certainly was not

their superior officer, master, or employer. Were it not for the abnormal signification attached to the word "dwelling" by some cases of doubtful authority, but in their facts distinguishable from the case before us, there would be no difficulty whatever; however, I am quite clear that the rooms in which the Sisters slept were not their dwellings within the meaning of the Act of Parliament.

This is sufficient to determine the case. For my own part, I do not think it is to be regretted that the refined vocation of the devout and gentle nun, that the serene beauty of her sequestered life, is not to be marred, profaned, by the distractions and turmoil of election strife.

FITZ GIBBON, L.J. :—

I concur with the Lord Chief Justice. The only difficulty I have is a doubt whether the County Court Judge has found the fact which is the foundation of our present decision, or whether he has stated enough evidence to justify us in inferring the necessary fact. The real issue is whether the rooms occupied by the members of this community were or were not occupied as *separate dwellings*. If that was the ground of decision of the County Court Judge, nineteen-twentieths of the present case was unnecessary, and much of it is irrelevant. Other questions are raised in the case, and I wish to say that I am not deciding any of them, and that I hold myself at liberty to decide them when they arise.

As to the higher considerations referred to by the Lord Chief Justice, I entertain no doubt that nothing could be more repugnant to truth or to fact than to hold that this institution was an aggregate of separate dwellings, and not the single dwelling of a *quasi*-corporate Religious Community. The property was vested in trustees. What are the trusts under which the buildings have been erected? [His Lordship here read the trusts upon which the premises were held, and which are stated, *ante* p. 456.] Under that trust the trustees have devoted the site, and the buildings in which these rooms are, to purposes which are to be ascertained from the Rules of the Order to which these ladies belong. What is the name of the institution? It is "the House

Appeal. 1899.

BANNON v. HANRAHAN.

Fitz Gibbon, L.J.

of Mercy," "the Congregation," "the Community." One chapter deals with the admission of poor women of good character to the "House of Mercy." The chapter dealing with the reception of Novices provides that as many shall be admitted as the funds shall permit, and no more, unless the applicant bring with her a sufficient dower for her maintenance, and for all other necessaries. The Sisters are to breakfast, dine, and sup together in the refectory. The Mother Superior is to preside at the meetings of the Community; she has to help her a body or council called "the Discreets," and the whole is under the control of the Capitular Assembly or Chapter. The Mother Superior is elected from among those who have a voice in Chapter, and the whole is founded on the model of a Christian family, the very opposite of a Village Community.

That being so, how are the internal arrangements settled? Each Sister has her own room to sleep in. The head of the house, the elected Mother Superior, arranges what room each Sister is to occupy, not as a dwelling, but as a place to sleep in. All the rest of their life is the life of a family, not occupying separate dwellings, not living as villagers, but occupying one single dwelling as their common home. I hold that there is no single part of this structure which is not used by the whole community. Is there any sole and exclusive use of any part? Sole and exclusive use implies separate control. Some confusion arises from introducing analogies from other cases. I prefer to see the facts of a case stated from the evidence rather than from the reports of other cases. In this case there is a suspicious resemblance to the statements as to the internal economy of the police station in *Clutterbuck* v. *Taylor* (1). But this case finds that each of these ladies can be changed from one room to another, that she can be refused a visitor, and can be ordered to open the door of her room, and to give up the key. There is no case where a person's bedroom subject to such control by another has been held to be separately occupied as a dwelling. I should certainly hold, as a fact, that these rooms were not separately occupied as dwellings. I say this independently of the difficulty that I have always found in these cases, as to whether a

(1) [1896] 1 Q. B. 395.

mere bedroom can ever constitute a dwelling at all, unless for a bedridden person. The County Court Judge says:—"I found that these ladies were not in point of law inhabitant-occupiers of the rooms separately occupied by them respectively." I think that this must mean that they had not such an occupation of these rooms as to make them inhabitant occupiers within the meaning of the Act.

The second question is—Did the claimants occupy these rooms by virtue of any office, service, or employment? On that point, I express no definite opinion; it is very difficult to read, "office, service, or employment," as an appropriate description of the relation between the Mother Superior and the members of this Community. She is herself one of the members. It looks as if the Act was intended to deal with persons in the relation of master and workman, employer and employed. In this state of life, no one occupies the position of employer, and no one is in the position of employee.

HOLMES, L.J.:—

The right of the eighteen ladies with whom this case is conversant to be retained upon the list of voters depends upon whether they fulfil the conditions prescribed by the third section of the Representation of the People Act, 1884. These conditions are three:—1, Each of the ladies must inhabit a dwelling-house; 2, she must inhabit it by virtue of an office, service, or employment; and 3, it must not be inhabited by any person under whom such lady serves in such office, service, or employment.

The case contains no definite and categorical findings on these matters, and its language is in other respects wanting in precision; but I understand the opening lines of the ninth paragraph to mean that the County Court Judge held that the evidence negatived the existence of the first of the above-mentioned conditions. If this was his view I agree in it. I am of opinion that it is a necessary inference from the facts set out in the case and the documents referred to therein, that none of these ladies inhabited a dwelling-house within the meaning of the third section. The case made on behalf of the appellants is that the bed-room occupied by each lady was a dwelling-house, and it is settled by many

Appeal. 1899.

BANNON v. HANRAHAN.

Holmes. L J.

decisions that a bed-room separately occupied by one person may fulfil the first condition of the section even when the occupier uses other rooms of the house in common with the rest of its inmates. But whether it does so or not depends not upon the single fact of separate occupation, but upon that fact taken in connexion with all the surrounding circumstances, especially in connexion with the origin of the occupation and the relation of the occupiers to the other inhabitants of the house. If, for example, the occupier is entitled to have a separate room, by either an express or an implied term of his agreement, it would be a matter of great importance in determining the question; but it is impossible to argue that these ladies have separate rooms assigned to them in pursuance of any contract. Nor can it be said that they enjoy a separate room by virtue of any trust or by reason of any duty, even of imperfect obligation imposed upon the owner of the premises. The land upon which the house is built is vested in trustees who, in exercise of their trusts, allowed it to be erected and used as a convent, the object evidently being that the Sisters of Mercy should occupy it as a religious congregation, and not that individual sisters should have exclusive possession of separate parts of it. I cannot conceive anything more antagonistic to the idea of conventual life, as it is generally understood, than to make each lady a separate householder within their common home. The Rules and Constitution of the Order given in evidence show that they are living together as a spiritual family under the immediate direction of a spiritual mother, who, amongst other duties, appoints where the Sisters are to sleep, placing two or more in the same room if she deems it expedient, entering the rooms at any time, and having authority to forbid the occupier to receive a visitor therein. Having come to this conclusion respecting the first condition required by the third section, it is unnecessary for me to consider the others. I may, however, say that unless I am bound by authority to decide contrary to my own opinion, I should be unable to hold that a Sister of Mercy has an office, service, or employment within the meaning of this section. It would be an abuse of language to speak of her membership of a religious congregation as an earthly service or employment, and although it might be termed an office, there is, as far as I can see, no person

under whom she serves. No doubt she is under authority—the authority of the Mother Superior, the authority of the Bishop of the Diocese, and the supreme authority of the Church; but it would seem to me that, except, perhaps, in the case of the Mother Superior, this authority is of a judicial character, and bears no analogy to that of a master over a servant. The Mother Superior probably comes nearer to what the section has in contemplation, but even as to her, I can hardly believe that the Legislature intended to describe her as a person under whom a Sister of Mercy serves.

Solicitor for the appellant: *Henry Murphy.*
Solicitor for the respondent: *C. Falls.*

R. D. M.

MAGNER, TENANT; HAWKES, LANDLORD (No. 2) (1).

Landlord and tenant—Land Law (Ireland) Act, 1896, *sect.* 5—*Character of holding—Demesne land.*

By lease dated the 10th January, 1752, the lands of K., in the county of Cork, comprising 204 acres, were demised by R. T. to W. O. for 990 years, subject to the yearly rent of £126 16*s.* The lessee's interest had been in the possession of the H. family for a great number of years, and the premises consisted of a handsome house, a garden, and out-offices, and there was ornamental timber in the lawn and on both sides of the house. In 1868 the place was in the possession of Captain S. H., who by will devised all his property to trustees, upon trust as to the said lands, after providing a jointure for his widow, for his son John H. on his attaining twenty-one, but in case he died under twenty-one, then to his two daughters, May and Frances, as tenants in common, to become vested on their attaining twenty-one; in case of the death of one, then the whole to the survivor; and in case of the death of all his children before attaining age, the testator left all his property to his brothers J. D. H. and R. N. H. The testator empowered his trustees to make leases of all his lands for any term consistent with the term

(1) Before LORD ASHBOURNE, C., SIR P. O'BRIEN, L.C.J., PALLES, C.B., FITZGIBBON, WALKER, and HOLMES, L.JJ.

Appeal. 1899. MAGNER, *Tenant:* HAWKES, *Landlord.*

for which the same were held, at the best and most improved rent; and he made his wife and his trustees executors. Captain S. H. died in Dec., 1868, and Mrs. H. alone proved the will. On the 11th May, 1872, Mrs. H. made a lease of the house and lands to J. D. H., her brother-in-law, for thirty-five years, at £310 a year. J. D. H. was a gentleman farmer. He subsequently got into financial difficulties, and died in 1883. The lessee's interest under the lease of the 11th May, 1872, was sold, and bought by M. for £1100. In 1887 M. served a notice to fix a fair rent, which was dismissed on the ground that the holding was demesne land. On appeal to the Land Commission this decision was affirmed, and the tenant appealed to the Court of Appeal, who dismissed the appeal. After the passing of the Land Law Act, 1896, he served a fresh originating notice:—

Held (affirming the decision of the Land Commission) that "when first demised" in sect. 5, sub-sect. (1) (*b*) (ii), of the Land Act, 1896, meant first demised in relation to the tenancy the owner of which was seeking to fix a fair rent:—

Held also, by the Lord Chancellor, the Lord Chief Justice, the Lord Chief Baron, and Holmes, L.J. (Fitz Gibbon and Walker, L.JJ., *dissentientibus*), that the circumstances of the case showed an intention that the lands should be preserved as demesne.

On the 5th July, 1890, the Land Commission dismissed an originating notice served by the tenant of the holding on the ground that the lands were demesne lands. On the 24th June, 1891, the Court of Appeal affirmed this decision. The facts are fully reported, 32 L. R. Ir. 285. After the passing of the Land Law Act, 1896, the tenant served a fresh originating notice, and the Land Commission, on the 25th March, 1899, held that the lands were demesne lands, reversing the decision of the Sub-Commission.

From that order the tenant appealed. The case was argued on the 10th and 11th May, 1899, before Fitz Gibbon, Walker and Holmes, L.JJ., by *Sullivan, Q.C.* and *Healy, Q.C.*, on behalf of the tenant, and *Matheson, Q.C.*, for the landlord. At the conclusion of the argument the Court reserved judgment, and subsequently required the case to be re-argued.

On the 22nd June, 1899, it was re-argued by *Healy, Q.C.* and *Wakely, Q.C.*, on behalf of the tenant, and *Matheson, Q.C.* and *Cole-Bowen* on behalf of the landlord.

Appeal. 1899.

MAGNER, *Tenant*; HAWKES, *Landlord.*

June 28.

The facts appear sufficiently from the judgments and from the previous report, 32 L. R. I. 285.

LORD ASHBOURNE, C. :—

This is an interesting case, the name and facts of which are familiar to us. It came before this Court eight years ago, and upon that occasion we had many of the topics discussed which we have heard to-day. It was pointed out, then as now, that when first demised, the Hawkes family were not the owners in fee, and it was argued that that was enough to displace their rights to have the lands held to be demesne lands. We over-ruled that objection, and decided that the lands were demesne lands, though the Hawkes family held them, not as owners in fee, but for the residue of a long term of years created in 1752. The Hawkes family had made them demesne lands, and they were let as such by Mrs. Hawkes, when she made the letting in 1872, to John Devonshire Hawkes, whose interest Magner had bought. That was the view of all the members of the Court, except Fitz-Gibbon, L.J., who dissented from the other Judges, when the case was before us in 1891.

If nothing further had occurred since then, there would be nothing further to say. But it has been argued that in consequence of a change in the law by the Act of 1896, with respect to demesne land, our former decision is no longer binding, and that the tenant has a right to have a fair rent fixed in consequence of sect. 5 of the Act. The portion of sect. 5, to which our attention has been directed is sub-sect. 1 (*b*) (ii)—"land which when first demised was demesne, and which the provisions of the contract of tenancy, or the circumstances of the case, show was intended to be preserved as demesne or resumed as demesne by the landlord."

Of course the counsel for the tenant, Mr. Healy and Mr. Wakely, urged both points, which were relied on in the Court below. The first point was that the words "first demised" means when first demised by the head landlord, and that as these lands were admittedly not demesne at the date of the lease of the 10th January, 1752, they were not within the section. I satisfy myself on this point by saying that I adopt the view of Meredith, J.,

Appeal. 1899.

MAGNER, *Tenant;* HAWKES, *Landlord.*

Lord Ashbourne, C.

which is in keeping with the scope of Land Legislation and the decisions, namely, that it means when first let to the tenant in occupation of the holding, or his predecessor in title.

But the main force of the argument was directed to the second point. It was said that, assuming that to be so, the Act of 1896 has effected a substantial change in the law, that although the process of undemesning had passed out of the argument, the *onus* of proof has been shifted by the operation of sect. 5, and that the *onus* now devolved on the landlord to prove an intention that the holding should be preserved, or resumed, as demesne. Mr. Matheson in his able and clear argument applied himself to show that the circumstances of the case itself proved an intention to preserve the lands as demesne lands, and those circumstances were the nature of the holding itself, the letting to John Devonshire Hawkes, and the circumstances and position of the parties. He referred to the facts of the case, as reported in 32 L. R. Ir. 285, and to the judgments of the members of this Court. He also referred to the very clear and able judgment of Litton, J., who delivered the judgment of the Land Commission, particularly to the passage in his judgment where he decided that the letting to John Devonshire Hawkes in 1872 was not an ordinary letting of this place as a farm, but was, from the relationship and position of the parties, something more in the nature of a family arrangement, for the purpose of preserving the place as demesne lands. That was my own view on the former occasion, that the object of the parties in making the letting in 1872, to John Devonshire Hawkes, the uncle of the minors, who had himself an interest in the property in remainder, was to preserve the holding in the condition in which it was. That view was adopted also by the Lord Chief Justice, by the Lord Chief Baron, and by Barry, L.J. I have heard nothing to induce me to alter that view. When the holding was let, in 1872, it was demesne, and all the circumstances of the case, the time of the letting, the relationship and position of the parties, the lease and the covenants which it contains, and the user, show an intention to preserve the premises as demesne. These were the views expressed by Meredith, J. in his judgment, and in my opinion that judgment should be affirmed, and the appeal dismissed with costs.

SIR PETER O'BRIEN, L.C.J:—

I concur in the conclusion arrived at by the Lord Chancellor, and for the reasons he has given.

PALLES, C.B.:—

The question in this case is one of fact merely. It is not disputed that the land when first demised was demesne; and I think that the contract, and all the circumstances of the case, show that it was intended that the land should be demesne in the hands of John Devonshire Hawkes, and those claiming through him. That intention, in my opinion, amounts to an intention that the land should be preserved as "demesne" within the meaning of sect. 5, sub-sect. 1 (*b*) (ii) of the Act of 1896. As the question is one of mere fact, and this is the final Court for the decision of the question, I do not think that the discussion by me of those facts would serve any useful purpose. I concur with the Lord Chancellor and with the Lord Chief Justice, and I think that the appeal should be dismissed with costs.

FITZ GIBBON, L. J.:—

I cannot concur in holding that the question in this case is a question of fact merely; and even assuming that it is a question of fact, I cannot concur in holding that the Act of 1896 has not introduced a change in the law affecting the case. In my opinion, not only has the Act of 1896 effected a material change, but also, if the decision of the majority of the Court be right, I find it difficult, if not impossible, to conceive any case in which the Act of 1896 will have any effect.

Sect. 50, sub-sect. 2, defines the way in which a case brought before the Land Commission for a second time is to be dealt with: "An application to fix a fair rent for a holding shall not be refused on the ground of any previous decision with reference to the holding or any part thereof, whether between the same parties or otherwise, if such application can be sustained under this Act or any of the Land Law Acts as amended by this Act, and where a tenant would, if this Act had been in force at the passing of the

Appeal. 1899.

MAGNER, *Tenant;* HAWKES, *Landlord.*

Fitz Gibbon, L.J.

Land Law (Ireland) Act, 1881, be now a present tenant." We, are told by that section that, if any change of law has taken place neither the holding nor the parties shall be held bound by any previous decision based upon the former law. We have decided that we cannot reopen any previous decision upon a question of fact—in other words, we cannot give new trials on questions of fact—if, the facts remaining the same, the result would be the same. I am, therefore, bound to consider whether the law affecting this holding has been changed, and if so, whether the new law brings it within the Land Acts.

The law before the Act of 1896 was settled; namely, that the exception of demesne land in the Act of 1881 took out of the operation of the Land Acts any land that was proved to have been demesne when the contract of tenancy was created, and which had not lost that character. In other words, a tenant who sought to have a fair rent fixed was deprived of that right, if the landlord proved that the holding was demesne at the date of the letting, unless the tenant proved that it had been "undemesned." The *onus* was on the landlord to prove that the land was demesne at the date of the letting, and if he proved that, then the tenant had the *onus* thrown on him of showing that it had been undemesned. Thus there are two points, and in my opinion only two, upon which the former decisions can now be decisions—1st, on the fact of demesning before and up to the letting; and, 2ndly, on the failure of the tenant to prove undemesning by or after the letting. These are both points of fact, and in point of law these facts alone are *res judicatæ*.

What is the change in the law? The section of the Act of 1881 which excepted demesne lands from the operation of the Land Law Acts was wholly repealed by the Act of 1896, which has enacted something else in its place. Sect. 5, sub-sect. 1 (*b*) (ii) is the only existing enactment, and it is substituted for what was swept away. What is the effect of that sub-section? The first change, which is admitted, is as to the *onus* of proof. It no longer rests on the tenant to prove undemesning, but the *onus* is now thrown on the landlord not only to prove demesning before and up to the letting, but further to show that, by and after the letting, the holding was intended to be preserved as demesne or resumed as

demesne by the landlord. But, besides the change in the *onus probandi*, the *probandum* also is changed, because part of what has now to be proved on behalf of the landlord was not necessary to his proof before; namely, the intention to preserve as demesne, or resume as demesne, by the landlord. It is therefore unnecessary, and misleading, to refer to cases which were decided upon the repealed Act of 1881, as the case comes before us under a changed law, and on an issue which was never before us hitherto, and this is a wider issue as against the landlord, who must now prove an intention that this holding should be preserved or resumed as demesne by the landlord.

I discussed the evidence on the former occasion. I thought it insufficient to sustain the landlord's case then, and *a fortiori* I think it insufficient to sustain the heavier, and distinctly additional, burden of proof which falls upon him now.

The lease is an ordinary agricultural lease; the premises are described as the dwelling-house and lands of Kilcrea, containing 194 acres; the rent is 32*s.* an acre, an ordinary agricultural rent, indicating that the dwelling-house must have been let at a comparatively small sum. It is stated in the evidence that the house is too large for the lands, and therefore it is suggested that it is "a mansion-house." But if so, why is the lease silent on the point, neither describing the house as a mansion nor the lands as demesne? There is a clause empowering the tenant to surrender every three years; there is a covenant that the tenant shall till the lands in the course of good husbandry; though there is a covenant for the preservation of the timber and trees, there is not a suggestion of a contract for the preservation of the dwelling-house as a mansion, or of the lands as demesne. If this contract of tenancy indicates an intention to preserve the holding as demesne, every ordinary agricultural lease must have the same effect, if there is a reservation of timber. It is my clear opinion that if the terms of this lease are sufficient to discharge the landlord's *onus* of proving an intention to preserve the holding as demesne, so as to bring the holding within the exception from the Act of 1896, that Act is waste paper, so far as it purports to change the law. Evidence of intention to resume as demesne by the landlord there is none.

Appeal. 1899. MAGNER, *Tenant:* HAWKES, *Landlord.* Fitz Gibbon, L.J.

So far as the case rests on the provisions of the contract of tenancy, the decision of the Court, with all due respect, appears to me to amount to this, that if the lease contains nothing, it is enough.

As to the other circumstances of the case, the evidence all came round to the position in life of the lessee, and his relationship to the lessor. I read the evidence upon this from the evidence given on the former occasion. Magner's evidence was—"John Devonshire Hawkes was a poor man, and he dealt in cattle; he was brother to Captain Hawkes, the late landlord, and brother-in-law of the lessor." Mr. Babington said, "John Devonshire Hawkes was a gentleman and a very large farmer: the holding consists of a large extent of land and a handsome house; immediately in front of the house is Kilcrea Castle—a place of great resort. . . . John Devonshire Hawkes made a new entrance from the county road with an entrance gate; the other entrance is the one referred to by Magner, and is to the rear of the house." That is described by the tenant in this way—"The entrance gate is a common wooden gate off a boreen." In his cross-examination, Mr. Babington said—"John Devonshire Hawkes was in occupation for a couple of years before the lease was made; he was a younger son; he was living at Belrose before he took the holding. Belrose is a gentleman's house; there was a large tract of land there farmed by John Devonshire Hawkes; that was his only property; he paid a head-rent of £46 a-year out of it to Lord Bandon; he became a very poor man before his death, and compounded with his creditors." On this evidence, he was, at his best, a gentleman farmer, who moved from one farm to another; but he never was anything but a farmer, living by farming, and living on his farm.

The only other matter relied on was his position with regard to the title. His only interest was reversionary and contingent: his brother's children were between him and the land. If they had died without issue before him, he would have become entitled in remainder, not to a demesne and mansion-house which he could occupy, but, as a tenant in common with another brother, to an undivided moiety of the property. If he had so become entitled, there must have been a partition, an incident very difficult to give effect to in the case of a mansion-house and demesne, and which

Appeal. 1899.

MAGNER, *Tenant:* HAWKES, *Landlord.*

Fitz Gibbon, L.J.

does not indicate, to my mind, any probability of an intention to preserve the character of demesne.

The lessor made the lease as executrix, and she dealt with the holding as such, converting it *pro tanto* into a chattel. This conversion was to last for thirty-five years as against the lessor, and I cannot find anything to indicate an intention to preserve the character of the land as demesne, either during the term or at its expiration. The tenant failed, and his interest was sold for £1100, a substantial sum; the bulk of the purchase-money can not have been given for the house, for it was "too large" for the holding; therefore it must have been paid substantially for the land, which was admittedly bought by an ordinary farmer, who has used it ever since as an ordinary farm.

The former decision in this case of *Magner* v. *Hawkes* was pronounced in 1891 (1), and I bow to it as an authority binding upon me upon the questions of fact which were material upon the then existing law. When the question came again before the Court in 1895, in *Graydon* v. *Trustees of Morgan's Charity* (2), I said (at p. 533), "Until *Magner* v. *Hawkes* (1), I clung to the idea which I had put forward in *Griffin* v. *Taylor* (3) that the Land Acts contemplated the possibility of occupation by the landlord, in connection with his residence, as the criterion of 'demesne land'; but, having stood alone in my opinion in *Magner* v. *Hawkes* (1), I loyally accepted the decision of the Court, and the subsequent cases, such as *Spencer* v. *Tedcastle* (4) and *Pratt* v. *Gormanstown* (5), showed that the possibility of resumption was not necessary, but that, as the Lord Chancellor put it, the word "demesne" was "used to describe the character of the lands."

The case of *Spencer* v. *Tedcastle* (4) is in the same volume of the Law Reports as *Magner* v. *Hawkes* (1), and in that case I said (at p. 417)—"No doubt the intention and power of resuming possession form an important element in determining whether a holding is 'demesne land.' I myself, perhaps more than the other members of this Court, have often, as in *Griffin* v. *Taylor* (3), laid

(1) 32 L. R. Ir. 285.
(2) [1895] 2 I. R. 513.
(3) 16 L. R. Ir. 302.
(4) 32 L. R. Ir. 411.
(5) [1894] 2 I. R. 557.

Appeal. 1899.

MAGNER, *Tenant;* HAWKES, *Landlord.*

Fitz Gibbon, L. J.

stress on the importance of this element, but *Magner* v. *Hawkes* (1) was a case in which it did not exist, and yet the majority of the Court, after re-argument, I alone dissenting, held that lands which were not originally demesne, which were let by the owner in fee as agricultural lands for a very long term of years, nevertheless were 'demesne lands' as between the termor and his occupying subtenant." The bearing of that understanding of the previous decision appears at once, when we remember that *Spencer* v. *Tedcastle* (2) was the case of a fee-farm grant, and that the Court in that case was deciding that the character of demesne might adhere to lands let to a tenant in fee-farm, and, therefore, that any intention of the landlord to resume possession, as demesne or at all, was not necessary to exclude demesne land from the Acts of 1881 and 1887.

In *Pratt* v. *Gormanstown* (3) two of the Judges did not decide the case on the ground of demesne; but I stated in my judgment (at p. 562), "In my opinion, the decision of the Court in *Magner* v. *Hawkes* (1) rules this case, not by the opinion of any one Judge, but by the essential and cardinal principle of the decision itself, which got rid of the idea of resumption by the owner in fee, as essential to 'demesne land.'"

I refer to these passages to show the construction which I put upon the previous decision, without any dissent from my colleagues at the time. As the Act of 1896 was plainly directed to the law as administered and laid down by this Court, I am entitled to attribute to Parliament the knowledge of the law laid down here, which the Act of 1896 was to amend. If so, the object of repealing the Act of 1881 and substituting the Act of 1896 for it, must have been to enact that, whereas before the new statute preservation as demesne, or intention to resume as demesne, was not essential to the exclusion of a holding from the Land Acts, section 5 should thenceforth make it so. The alteration in the law is enacted by section 5 in these words:—"The Land Law Acts . . . shall not apply to . . . a tenancy in a holding which substantially consists of land which

(1) 32 L. R. Ir. 285. (2) 32 L. R. Ir. 411.
(3) [1894] 2 I. R. 557.

when first demised was demesne, and which the provisions of the contract of tenancy, or the circumstances of the case, show was intended to be preserved as demesne or resumed as demesne by the landlord."

The new law has brought this intention in for the first time. We did not—and we could not—in 1891, decide that this intention was proved, because that issue did not then arise; and, in my judgment, the operation of section 5, sub-section 1, upon this case of *Magner* v. *Hawkes* now, is to make proof of that intention necessary. Holding that it is not proved, I think that the case does not come within the exception from the Land Law Acts contained in the Act of 1896.

WALKER, L.J.:—

I agree with Fitz Gibbon, L.J. I think that the only part of this case calling for serious consideration is the question, whether the intention of the landlord to preserve or resume as demesne has been proved from the provisions of the contract of tenancy or the circumstances of the case. Upon this point I do not take the view of my three colleagues who have affirmed the decision of Meredith, J. Section 5 of the Act of 1896 deals with land, which when first demised was demesne, and the landlord must prove that, and so also he must prove an intention to preserve or resume as demesne. The mere fact of the letting being of demesne land cannot be a "circumstance" showing an intention to preserve or resume as demesne, for if so, this part of the section would have no operation.

As I understand the judgment of the Lord Chancellor and of the other members of the Court who concur with him, they hold that there are three grounds for deciding that there was an intention to preserve or resume as demesne:—(1) the nature of the holding, which comprised a large house, as compared with the amount of land; (2) the relationship of the lessee to the owner, the idea being, it is alleged, to keep the place in the family; and (3) the circumstances under which the letting was made.

I quite agree, starting with the assumption that the lands were demesne, that the circumstances are not sufficient to show

Appeal. 1899.

MAGNER, *Tenant;* HAWKES, *Landlord.*

Walker, L.J.

any intention to undemesne when the letting was made to John Devonshire Hawkes. The terms of the lease may not be, and in this case, I think, are not sufficient to undemesne, that is, they may be consistent with the lands continuing as demesne, but that is not enough to satisfy the *onus*, which is thrown upon the landlord by sect. 5, sub-sect. 1 (*b*) (ii), of proving affirmatively an intention to preserve or resume as demesne. The contract being out of the case, the question remains—Do the circumstances of the case show the intention? That is an inference of fact, and in my judgment the inference from the facts of this case does not support any such intention.

I, therefore, concur with Fitz Gibbon, L.J., in holding that the appeal should be allowed.

HOLMES, L.J.:—

I concur in the judgment given by the Lord Chancellor and the two members of the Court who followed him; and I agree with the Lord Chief Baron in thinking that the only question is one of fact.

As far as I am aware there is no difference between us as to the legal principles to be applied to the circumstances of the case. The landlord is bound to show that the lands came within the Land Law (Ireland) Act, 1896, sect. 5 (1) (*b*) (ii); and we all give the same construction to this clause. We adopt Mr. Justice Meredith's view of the meaning of the words, "first demised" and recognise that the former decision settled that the holding under consideration was demesne when "first demised," as thus interpreted. We also hold that it must be shown either from the provisions of the contract of tenancy, or from the surrounding circumstances that the land was intended to be preserved as demesne during the tenancy, or resumed as demesne by the landlord on its termination. When the appeal was opened during the last sittings, it appeared to me that whether it was necessary to decide the last-mentioned point on the occasion of the former appeal or not, most of the members of the Court expressed a strong opinion on it; and not having formed at the time a final judgment upon this subject, I felt that I should derive great assistance from Judges who had already carefully considered the

Appeal. 1899.

MAGNER, *Tenant*: HAWKES, *Landlord.*

Holmes, J.

matter. Having now this advantage, and having also heard the fuller arguments addressed to us to-day, I have come to the conclusion that the second condition imposed on the landlord has been fulfilled.

It is, as the Lord Chief Baron has pointed out, unnecessary to enter, in detail, upon the grounds upon which we decide a pure question of fact; but I desire to indicate generally what has influenced my own mind. I do not attach importance to the terms of the lease taken by themselves. Mr. Bowen in his able argument, has called attention to some provisions showing an intention that the lands should be preserved as demesne; but there are other portions of it that might be relied on to support the contrary contention. I, therefore, regard the lease as a neutral document in itself. But the intention can be inferred from the circumstances of the case. Some time after the death of Captain Hawkes, the former occupier of the house and lands, his widow and executrix, who removed to another neighbourhood for the education of her children, gave possession to her husband's brother, John Devonshire Hawkes. He lived there for two years, during which it must be assumed that he held the lands as demesne. He then took from his sister-in-law the lease now vested in the tenant. The house is found by the Sub-Commission to be entirely too large for the holding as a farm. The woods and timber are injurious to it for agricultural purposes. The rent, £310, was very high, having regard to the fact that the acreage—197 acres in the whole—includes a considerable quantity of land of little value. Not only did John D. Hawkes bind himself by the covenant in the lease to maintain a house far beyond the wants of the premises as a farm, he laid out money in erecting office houses in a more convenient situation than those previously existing, and in making a new avenue and entrance gate—an extraordinary expenditure, if he were as represented by the present tenant, a very poor man, trying to earn a living out of the land. Having taken the lease he continued to live there for many years, as his brother had done; and, although before the end of his life he became involved in pecuniary difficulties, this happens to many occupants of a mansion and demesne. From all these circumstances I draw the inference that the letting was

Appeal 1899.

MAGNER, *Tenant*; HAWKES, *Landlord*.

Holmes, L.J.

made with the intention that the house and demesne should be kept up during the tenancy. It will thus be seen that the case really depends, and is decided, on a question of fact. This gets rid of the argument, that a judgment for the landlord would be violating the intention of the Legislature in enacting the 5th section of the Act of 1896.

Whether it was the former appeal in *Magner* v. *Hawkes* (1) that suggested part of that section, I do not know; but I assume that when Parliament enacted that an intention might be shown by the circumstances of the case, it became the duty of the tribunal to which jurisdiction is given, to decide whether the specified intention is shown by the circumstances. This is what we have done in the present case.

Solicitor for the tenant: *Maurice Healy.*
Solicitor for the landlord: *William Guest Lane.*

R. D. M.

Q. B. Div. 1899.

June 13, 14, Nov. 20, 21, 22.

CROWLEY *v.* O'SULLIVAN (2).

(1899. No. 2187.)

Statute of Frauds—Part performance—Action for breach of contract.

An agreement was entered into between C. and O'S., whereby O'S. was to acquire certain premises, with stock-in-trade and book debts, in B. wherein business was to be carried on in partnership between them for a period of not less than three years. In pursuance of this agreement the purchase was effected by O'S., with his own money, and thereupon C. and O'S. entered into possession under the style of O'B. & Co. They opened a bank account in that name, and carried on business as partners for a period of seven months. The heads of the agreement were drawn up, but were never signed, and a draft deed of co-partnership passed from one to the other during the seven months, undergoing revision of its details. Finally, O'S. refused to execute this deed when called upon by C. to do so, whereupon C. instituted an action at common law for damages and recovered a verdict for £700:—

(1) 32 L. R. Ir. 285.

(2) Before PALLES, C.B., and ANDREWS and JOHNSON, JJ.

Held, that, the agreement being one of which a Court of Equity would have had jurisdiction to enforce specific performance, the doctrine of part performance applied to take the case out of the Statute of Frauds, the parol evidence upon which the verdict was founded was properly admitted, and the verdict should be upheld.

EARLY in June, 1898, a business house, with stock-in-trade and book debts in Bantry, was offered for sale as a going concern. The plaintiff, a trader in Dunmanway, and the defendant, a trader in Bantry, were each intending purchasers. They met on the 15th June, and agreed that the defendant should purchase the premises and that both should carry on business in partnership, the purchase money being supplied by the defendant, who was to receive 5 per cent. on the amount, the premises when purchased to be the property of the firm, and the profits to be divided in equal shares between them. On the 4th July they met and drew up tenders, one by the plaintiff, offering £1925, and the other by the defendant, offering £2025. These were sent in to the vendor, who was administratrix of Joseph O'Brien, the late owner. On the 8th July the defendant's tender was accepted, and on the 11th he sent a post card to the plaintiff apprising him that he had concluded the purchase, and asking him to come over to Bantry. The plaintiff, on the 13th July, went to Bantry, found the defendant in possession, and from that time forward carried on the business, spending three days weekly there, the defendant's son representing the defendant. The remainder of the plaintiff's time was devoted to his own business in Dunmanway. On the 29th July, the defendant asked the plaintiff for the heads of the partnership that he might get a deed prepared by a solicitor.

The plaintiff had the terms in a book where he had a record of the agreement. He furnished the defendant with a copy, and at the same time, according to his account, dictated the heads from this book which the defendant took down in a book of his own. The defendant denied this. These heads provided, among other things, that the partnership style should be "O'Brien & Co.," that the term should be three years at least, with liberty to either party after the expiration of three years, to terminate the agreement at the end of any subsequent year by six months' notice. There

Q. B. Div. 1899. CROWLEY v. O'SULLIVAN.

was a provision that, on the retirement of either partner, he should be entitled to three times his average share of the profits for the previous three years.

On the 4th August the defendant proposed to introduce his son into the firm, to which the plaintiff at first demurred, but subsequently consented, if the defendant and his son desired, the arrangement being that in such event the son would receive half the profits, and the plaintiff the other half, the defendant in the meantime receiving 5 per cent. on the original purchase money. It was admitted on both sides that the purchase had been an advantageous one, the value of the premises, including good will and shop debts, being more than £1000 in excess of what was paid for them. The draft partnership deed was prepared by Mr. Maurice Healy, solicitor, Cork, and between September, 1898, and January, 1899, passed between the parties undergoing revision of its terms. On the 7th January, 1899, when the engrossment was ready for execution, the defendant's son, in presence of the defendant and the plaintiff, objected to sign, complaining that the plaintiff was getting portion of the benefit of the purchase money, though he had contributed no part thereof. The defendant's wife overheard, and joined in the conversation, protesting that the plaintiff who had no money in the concern had no right to a share in any of the benefit. The son, thereupon, raised difficulties about agreeing to the deed, and interviews between the parties up to the 7th February, proved ineffectual to reconcile these differences.

On the 7th February the plaintiff wrote to the defendant calling upon him to procure his son to execute the deed, or else to ignore the son, and to enter into partnership with him upon the terms originally agreed to. The defendant replied that he was willing to enter into any agreement which his son and the plaintiff would agree to, but reminded the plaintiff that it was only on account of his son that he entered into this matter at all. The plaintiff replied that this latter statement was not a fact, that the son's name was never mentioned until the 4th August, that it was now obvious to the plaintiff that the defendant was only using the son as an instrument for backing out of the agreement, and defrauding the plaintiff of the benefit of the purchase. Thereupon the plaintiff instituted the present action, claiming damages for

defendant's breach of the partnership agreement entered into between the defendant and the plaintiff, whereby in consideration of plaintiff's abstaining from bidding for the premises in question, the defendant undertook to buy them for the benefit of a partnership to be entered into between the plaintiff and the defendant. The case was tried before the Right Hon. Mr. Justice O'Brien at Cork Spring Assizes for 1899, and resulted in a verdict for the plaintiff for £700 damages. At the trial the defendant's counsel objected that there was no concluded agreement between the plaintiff and the defendant, and that even if there were such concluded agreement, there was no written evidence of it within the Statute of Frauds; and that, furthermore, if there were any such agreement, it was mutually waived, and an agreement between the defendant and the defendant's son substituted therefor. To these latter objections the plaintiff rejoined that the agreement with the son was conditional upon its being carried out, and that unless that was done the understanding was that the original agreement should continue. It was further insisted that the objections of the son were not *bona fide*, but were a contrivance procured by the defendant with the privity of the son to evade carrying out his contract.

The following were the questions left to the jury by Mr. Justice O'Brien, and their answers:—

1. Was there an agreement made between the plaintiff and the defendant for a partnership between the plaintiff and the defendant?—Yes.

2. Was the concern bought for the purpose of such agreement?—Yes.

3. Was the agreement for such partnership rescinded with mutual consent?—No.

4. Was there a breach of the agreement by the defendant?—Yes.

5. Did the plaintiff and the defendant agree to the substitution of the son in place of the father in the partnership?—Yes.

6. Were the objections made to carrying out of the partnership *bona fide*?—No.

7. Were they made in order, and with the object, with the privity of the defendant, to defeat the agreement, and to exclude the plaintiff from the benefit of the partnership?—Yes.

Q. B. Div. 1899.

CROWLEY v. O'SULLIVAN.

8. Did the plaintiff intend to give up the agreement for the partnership with the father and wholly abandon it, whether or not the second agreement making the son a partner was carried out?—No.

9. Was it only dependent upon the substituted agreement—that for making the son a partner—being eventually carried out?—Dependent on the substituted agreement being carried out.

10. Was any memorandum of the terms taken down by the defendant himself in a book or on a piece of paper, besides the other documents in the case?—Yes.

11. Did the defendant undertake to procure the assent of the son to the proposed substituted partnership with the son?—Not answered.

12. Did the defendant refuse or fail, on the plaintiff's demand, to carry out the original agreement for a partnership between himself and the defendant alone?—Yes.

13. What are the damages for the defendant not carrying out the contract entered into for a partnership with himself?—Measure damages at £700.

Judgment was entered for the plaintiff for £700 and costs. The defendant moved to set aside the verdict and judgment for plaintiff, and in lieu thereof to enter judgment for him, or, in the alternative for a new trial.

O'Connor, Q.C. (with him *Bushe, Q.C.*, and *A. M. Sullivan*), for the defendant:—

The action is brought against the defendant for breach of an agreement to become partner. The partnership assets include lands, and the alleged contract is therefore within the Statute of Frauds: *Gray* v. *Smith* (1); *Caddick* v. *Skidmore* (2). Or, if the first agreement for a partnership at will was varied for a partnership for three years, it is within the statute. There is no memorandum to charge the defendant. The doctrine of part performance does not apply to such contracts: *Britain* v. *Rossiter* (3); *Maddison* v. *Alderson* (4). It relates only to lands, and is available only in

(1) 43 Ch. Div. 208.
(2) 27 L. J. Ch. 153.
(3) 11 Q. B. D. 123.
(4) 8 App. Cas. 467.

equity to enforce specific performance. The Judicature Acts and Lord Cairns' Act have not given a new right to sue for damages at common law. *Lavery* v. *Pursell* (1); *Rock Portland Cement Company* v. *Wilson* (2). Assuming the extended doctrine suggested in *M'Manus* v. *Cooke* (3), still this is a contract of which the Courts of Equity would not decree specific performance, and would therefore not give damages: *Scott* v. *Rayment* (4). There is no evidence of any of the breaches pleaded.

Bourke, Q.C. (*Wright*, Q.C., and *P. D. Fleming*, with him), for the plaintiff:—

Part performance takes a case out of the Statute of Frauds not merely in cases concerning lands but in every case where Courts of Equity have jurisdiction to decree specific performance: *M'Manus* v. *Cooke* (3). Where a contract of partnership for a definite term has been part performed the Court will decree specific performance: *England* v. *Curling* (5); *Hibbert* v. *Hibbert* (6); *Scott* v. *Rayment* (4); *Baxter* v. *West* (7); *Burdon* v. *Barkus* (8). For breach of this contract an action-at-law lies. This is the only remedy for all breaches of partnership agreements which cannot be specifically enforced: *M'Neill* v. *Reid* (9); *Greenham* v. *Gray* (10). *Lavery* v. *Pursell* (1) is not a decision to the contrary. That only shows that in a Court of Equity damages in lieu of specific performance under Lord Cairns' Act could only be obtained, when a suit for specific performance lay. This contract was one concerning the purchase of land, and the purchase was made, the conveyance obtained, and possession of the land taken by defendant and plaintiff in pursuance of the contract. Therefore, the ordinary principle that part performance in such a case excludes the Statute of Frauds, applies. When a person, by parol arrangement with another, purchases land in trust for the other either alone or jointly with himself, and having obtained the conveyance in his own name

(1) 39 Ch. D. 508.
(2) 52 L. J. Ch. 214.
(3) 35 Ch. D. 681.
(4) L. R. 7 Eq. 112; 38 L. J. Ch. 48.
(5) 8 Beav. 129.
(6) Coll. Partn. 133.
(7) 1 Dr. & Sm. 173.
(8) 4 De G. F. & J. 42.
(9) 2 M. & S. 89.
(10) 4 Ir. C. L. R. 501.

Q. B. Div. 1899.

CROWLEY v. O'SULLIVAN.

without any written declaration of trust, then repudiates the trust and relies on the Statute of Frauds to exclude parol evidence of it, he is precluded from doing so on the principle that he will not be allowed to use the statute to cover a fraud: *Lincoln* v. *Wright* (1); *Booth* v. *Turle* (2).

A. M. Sullivan, in reply:—

Specific performance of an agreement to become partners has never been granted. In *England* v. *Curling* (3) the parties actually were partners, and the Court interfered to prevent fraud on an existing partnership. The doctrine of part performance has never been applied otherwise than to agreements relating to the user of land, and the plaintiff's claim to divide increment of capital value as "profits" is unsustainable in law: *Cooke* v. *Benbow* (4). The defendant fully performed his part of the agreement. Entry on the business was under an agreement for a partnership at will. The Statute of Frauds answers the allegation of the subsequent three years' agreement. The only breach suggested is non-execution of the deed. If this was requisite to make plaintiff a partner, the Court will never decree specific performance of such an agreement. If it was not requisite plaintiff suffered no loss. The evidence cannot support either breach or damages.

Nov. 22.

PALLES, C.B.:—

Many questions, some of nicety and novelty, have been argued with great ability; but upon the whole, we have arrived at the clear conclusion that the verdict had for the plaintiff must stand. The learned Judge reports to us that early in the case he intimated to the parties that in his opinion the case could not be tried upon the pleadings as they stood, and that he would try the case irrespective of the pleadings, leaving those pleadings afterwards to be treated as amended in any way which might be deemed right, and no objection was taken to that. Time was not lost, as it certainly would have been, in framing at the trial the amendments of the

(1) 4 De G. & J. 16.
(2) L. R. 16 Eq. 182.
(3) 8 Beav. 129.
(4) 3 De G. J. & S. 1.

pleadings. I, therefore, proceed to see, irrespective of the pleadings, whether upon the findings, and upon such inferences of fact not inconsistent with the findings as we ought to draw under the Judicature Act, there are circumstances which amount to a cause of action which will sustain the verdict which has been found for £700. The fact that there was a partnership agreement has been found. The terms of that agreement have not been found. The evidence of the plaintiff is that it was a partnership for three years. If the written documents that he relies upon are referred to, it will be found that it was to endure until terminated in the way provided by the contract, and that it could not be so terminated by notice to that effect earlier than at the expiration of three years. No evidence of the duration of the partnership is given by the defendant, but he says that he told Mr. Healy, his solicitor, the substance of what had been agreed upon, and that Mr. Healy prepared the draft of the agreement in which the term is stated as I have mentioned. I therefore have no difficulty in arriving at the conclusion that in effect the agreement for a partnership was one that should endure for at least three years.

There is also plain evidence that it was intended that the terms of the agreement should be incorporated in a deed, and that the defendant refused to execute such a deed. Now the circumstances which I have stated, were there nothing more in the case, would plainly give the plaintiff a cause of action. "You (the defendant) agreed to enter into a partnership with me for a certain term, the terms of that partnership arrangement to be embodied in a deed, and you, although requested, refused to execute the deed to that effect." There is but one answer in substance worthy of consideration given to that cause of action, and that is the Statute of Frauds. The reply to that defence of the Statute of Frauds is that this is a case in which, before the Judicature Act, specific performance of the agreement would have been decreed by a Court of Equity, that therefore part performance may take the case out of the statute, and that that part performance can be relied upon whether the relief which a Court of Equity would have thought proper to have given before the Judicature Act or this Court may now think

Q. B. Div. 1899.

CROWLEY v. O'SULLIVAN.

PALLES, C.B.

proper to give, is specific performances or damages. The rejoinder to that is twofold. First the defendant says that, as a matter of fact, there were no acts sufficient to amount to part performance; and, secondly, that even if there were acts which, were this a contract in relation to land, would amount to part performance, still the equitable doctrine of part performance is not applicable to such a contract as this, but is confined to contracts relating to land. Upon both of these questions my opinion is against the defendant.

I first take the acts here that are relied upon as part performance. I may say in the first instance that I do not agree with Mr. Bourke's argument that upon the first conversation between these parties before this property was bought there was an agreement for a three years' partnership or for a partnership not determinable sooner than three years. I should have expected that, if that were the agreement, that the plaintiff would at the trial have so stated in express terms. "I find," he says, "that there is no record of that conversation," and I cannot therefore assume that at that conversation he took the record that is now relied upon as constituting the terms. No doubt he says that he had written down these terms before the 29th July; but I am not satisfied either that he did so, or that there is any evidence that they were written before the sale or even before the entry of the plaintiff into possession. But in my opinion that circumstance which has been so much commented upon, upon both sides during the discussion, is immaterial. I treat the arrangements which were made prior to the 29th July as an agreement for an intended partnership, the duration of which I am willing to treat as not defined until the 29th July. I hold that upon that 29th July the duration and all the terms were fully agreed to, and that prior to the 29th July the plaintiff, as one of the partners, entered into possession and carried on this business under the name of O'Brien & Company. Upon the 29th July, according to the defendant's evidence, an act (which I treat as co-temporaneous with the terms being fully settled) was done by a bank account being opened in the name of O'Brien & Company, and from that 29th July, during the term of seven

months, the business was carried on by the plaintiff unquestionably as partner. He never was in these premises except as partner, and the business for that term of seven months was carried on by him as one of the partners. These acts are sufficient to amount to part performance, even upon the supposition that the term of three years was not arranged until the 29th July.

I think the authorities are plain, that acts of that description are sufficient to amount to part performance, and that part performance can be relied upon in a case of this description. There are two cases which to my mind clearly establish the first of these propositions. The first is *Hibbert* v. *Hibbert* (1), of which there is no more than a note in Collyer on Partnership, p. 133; the second is *England* v. *Curling* (2), which is a case that has ever since been treated as law and is referred to in all the recent text-books upon Partnership. There it was held that an agreement for a partnership might be decreed to be specifically performed by execution of a partnership deed, and then it goes on to say that partners may make constant variations in the terms of their partnership agreement, which may be evidenced not only by writing but by their conduct. In giving judgment Lord Langdale says:—"With respect to a partnership agreement, it is to be observed that all parties being competent to act as they please, they may put an end to or vary it at any moment; a partnership agreement is therefore open to variation from day to day, and *the terms* of such variations may not only be evidenced by writing, but also *by the conduct of the parties* in relation to the agreement and to their mode of conducting their business; when, therefore, there is a variation and alteration of the terms of the partnership, it does not follow that there was not a binding agreement at first." And then when he decreed specific performance he referred it to the Master to ascertain "Whether any and what variations have been made in said agreement, by and with the assent of the several parties thereto, since the date thereof," and that the master settle and approve "of a proper deed of co-partnership between the said parties, in pursuance of the said agreement,

(1) Coll. Partn. 133. (2) 8 Beav. 129.

Q. B. Div. 1899.

CROWLEY v. O'SULLIVAN.

Palles, C.B.

having regard to any variations which he may find to have been made in the said agreement, as hereinbefore directed."

As against those decisions one case only was referred to, that is the decision of Sir George Giffard, when Vice-Chancellor, in *Scott* v. *Rayment* (1). I ventured to suggest, when that case was cited, that the distinction between it and *England* v. *Curling* (2) was that in *England* v. *Curling* (2) there had been part performance, which there had not been in *Scott* v. *Rayment* (1). I understood that the argument was that no such distinction was drawn in the case; but having read it since the argument I find that that was the exact ground of the decision. It will be found that the matter there rested on the agreement, as distinguished from the entry upon the actual business of the partnership, that upon the 2nd June, 1868, the defendant wrote to the plaintiff to say that he had sustained some heavy losses, and that at a meeting with the plaintiff on the 4th June, he refused to perform the contract. Sir George Giffard refers to *England* v. *Curling* (2) and *Hibbert* v. *Hibbert* (3), and then proceeds in these words:—"In both cases there had been part performance, and I do not at all hesitate to say, that in both it was essential to the ends of justice that the *status* of the parties should be ascertained, determined, and fixed; and especially in *England* v. *Curling* (2) is that manifest, when one finds that there was a direction to ascertain, in substance, what the agreement between the parties was."

The contest in *Scott* v. *Rayment* (1) was, whether the case should proceed in equity or at law; and, as I read the judgment, it is put upon the ground that there was no part performance, and that, although the agreement was in writing, it was an ordinary case in which an action at law was the proper remedy.

Therefore, upon the first ground, as to there being part performance, in fact, here, I am in favour of the plaintiff; I now come to the question whether part performance can be relied upon in a case of this description. I confess that for years I have been under the impression that when one of the terms of an agreement between parties was that the agreement should be embodied in a deed, a Court of Equity

(1) L. R. 7 Eq. 112; 32 L. J. Ch. 38. (2) 8 Beav. 129.
(3) Coll. Partn. 133.

would interfere to specifically perform so much of the contract as provided that a deed should be executed. But in consequence of the later decisions that have been referred to, I do not rely upon that view. Let that be considered hereafter; I do not think it arises here. The allegation is that the doctrine of part performance applies only to cases in which land is concerned. Now, assume for a moment that that is so—this is an agreement in relation to land. This property was purchased as part of the partnership property, although at the time, the term of the partnership was not arrived at. Part of the contract is that this interest in land shall form part of the capital of the firm; and as an agreement cannot take effect in part, unless it takes effect in the whole, it appears to me that there is no foundation in the case for the able argument that has been addressed to us, which asks us so to limit the doctrine of part performance as to render it inapplicable here. But then I should like to guard myself from the opinion that the true limit of its application is contracts in relation to land. No doubt that was said in *Britain* v. *Rossiter* (1) by the late Master of the Rolls; and the matter was urged subsequently before the House of Lords in the case of *Maddison* v. *Alderson* (2). I do not, however, read the judgment of Lord Selborne in *Maddison* v. *Alderson* (2), as going that length. On the contrary, I think that, when properly considered, it is an authority for the plaintiff here. He says at p. 475:—"From the law thus stated the equitable consequences of the part performance of a parol contract concerning land, seem to me naturally to result." He was not limiting the application of the doctrine to land, but tracing out the origin of this doctrine. "In a suit founded on such part performance, the defendant is really 'charged' upon the equities resulting from the acts done in the execution of the contract, and not (within the meaning of the statute) upon the contract itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation, would follow. Let the case be supposed of a parol contract to sell land, completely performed on both sides, as to everything except

(1) 11 Q. B. D. 123. (2) 8 App. Cas. 467.

Q. B. Div. 1899.

CROWLEY v. O'SULLIVAN.

Palles, C.B.

conveyance; the whole purchase-money paid; the purchaser put into possession; expenditure by him (say in costly buildings) upon the property; leases granted by him to tenants. The contract is not a nullity; there is nothing in the statute to estop any Court which may have to exercise jurisdiction in the matter from inquiring into and taking notice of the truth of the facts. All the acts done must be referred to the actual contract, which is the measure and test of their legal and equitable character and consequences. If, therefore, in such a case a conveyance were refused, and an action of ejectment brought by the vendor or his heir against the purchaser, nothing could be done towards ascertaining and adjusting the equitable rights and liabilities of the parties, without taking the contract into account."

Then he adds this, to which I call particular attention—"The matter has advanced beyond the stage of contract; and the equities which arise out of the stage which it has reached cannot be administered, unless the contract is regarded." And in the same way, if an action of ejectment was brought here against the partnership, it would be impossible, having regard to this property having been purchased for the partnership, the partnership having entered into possession, and carried on trade under the partnership arrangement, it would be impossible to determine the rights and liabilities of the parties, without ascertaining what the contract was; and, for that reason, *Maddison* v. *Alderson* (1) is an authority for the plaintiff instead of against him. I cannot find that Lord Selborne lays down here, that part performance is confined to cases of land. The matter came later on for consideration before Mr. Justice Kay, afterwards Lord Justice Kay, in *M'Manus* v. *Cooke* (2); and that which is, in my view, the true rule was there laid down, that the doctrine of part performance is applicable to every case in which a Court of Equity would before the statute, have sustained a suit for specific performance, were the contract in writing. There, of course, the statement in *Britain* v. *Rossiter* (3) was much pressed upon Mr. Justice Kay, and he says:—"In *Morphett* v. *Jones* (4) Sir T. Plumer states the equitable

(1) 8 App. Cas. 467.
(2) 35 Ch. D. 681.
(3) 11 Q. B. D. 123.
(4) 1 Swans. 181; 5 Vin. Abr. 323, pl. 41.

doctrine thus:—'In order to amount to part performance an act must be unequivocably referable to the agreement; and the ground on which Courts of Equity have allowed such acts to exclude the application of the statute, is fraud. A party who has permitted another to perform acts on the faith of an agreement, shall not insist that the agreement is bad, and that he is entitled to treat those acts as if it had never existed. That is the principle, but the acts must be referable to the contract. Between landlord and tenant, when the tenant is in possession at the date of the agreement, and only continues in possession, it is properly observed that in many cases that continuance amounts to nothing; but admission into possession, having unequivocal reference to the contract, has always been considered an act of part performance. The acknowledged possession of a stranger in the land of another is not explicable except on the supposition of an agreement, and has, therefore, constantly been received as evidence of an antecedent contract, and is sufficient to authorise an inquiry into the terms; the Court regarding what has been done as a consequence of contract or tenure.' In the speech of Earl Selborne in *Maddison* v. *Alderson* (1), which contains an elaborate examination of this doctrine of part performance, the latter portion of the quotation which I have just cited is mentioned with approval, and also these words of the late Vice-Chancellor Wigram from *Dale* v. *Hamilton* (2). 'It is, in general, of the essence of such an act that the Court shall, by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in, if there were no contract' . . . Earl Selborne's conclusion is: 'the acts of part performance, exemplified in the long series of decided cases, in which parol contracts concerning lands have been enforced, have been (almost, if not quite, universally) relative to the possession, use, or tenure of land. The law of equitable mortgage by deposit of title-deeds depends upon the same principles.'"

(1) 8 App. Cas. 467. (2) 5 Hare, 369, 381.

Q. B. Div. 1899. CROWLEY v. O'SULLIVAN. PALLES, C.B.

Treating that judgment of Lord Selborne as not limited in the way that is relied upon here, he goes on to consider the doctrine. He disapproves of the rule laid down in *Britain* v. *Rossiter* (1), and he holds that the doctrine of part performance is applicable to any case in which a Court of Equity would, before the statute, have decreed specific performance.

[The Chief Baron then discussed the question as to the amount of damages, and ultimately expressed his opinion that the motion to set aside the verdict should be refused with costs.]

ANDREWS and JOHNSON, JJ., concurred.

Solicitor for the plaintiff: *P. T. Carroll.*
Solicitor for the defendant: *Maurice Healy.*

J. L.

Q. B. Div. 1900. Dec. 16.

REG. (MORELL) *v.* JUSTICES OF CO. ANTRIM (2).

Licensing law—Licence for sale of intoxicating liquors on or off the premises—Renewal—Certificate of Justices as to "the peaceable and orderly manner in which such house has been conducted in the past year" (17 & 18 *Vict. c.* 89, *s.* 11)*—Licence lying dormant for consumption "on," but used for consumption "off," the premises—Undertaking given by licensee not to use the licence, or to use same in limited manner only—Obligation to supply reasonable refreshment to all comers.*

D. & Co., large distillers and wholesale and general family wine and spirit merchants, held for many years an ordinary retail licence for consumption of spirits "on or off the premises" in respect of their place of business in Belfast. Upon their application in 1899 to the Justices of Petty Sessions for a renewal of this licence, objection was made by the officer of police that the premises had not been "conducted" as licensed premises in the past year. Save that some six half-glasses of whiskey had been sold and consumed thereon, there was no evidence of any trade as publicans being carried on by the applicants of

(1) 11 Q. B. D. 123.
(2) Before PALLES, C.B., and JOHNSON, GIBSON, and MADDEN, JJ.

supplying the public with intoxicating liquor for consumption *on* the premises; but there was evidence that a large trade was done in sending out and delivering from time to time to customers spirits in quantities between two gallons and two quarts—a trade not covered either by applicants' wholesale licence (43 & 44 Vict. c. 24, ss. 102, 104), or their licence as spirit grocers (8 & 9 Vict. c. 64, s. 1):—

Held, on application for a *certiorari* to quash the grant of a certificate by the Justices, that, the premises not having been conducted as licensed premises for the consumption of intoxicating liquors *on the premises* during the preceding year, it was not competent to the Sessions to grant a certificate as to the peaceable and orderly manner in which same had been conducted, *as licensed premises*, in that period.

Reg. (*Cox*) v. *Recorder of Dublin* (16 L. R. Ir. 424), and *Reg.* (*Lambe*) v. *Justices of Co. Armagh* ([1897] 2 Ir. R. 57) applied.

Quære, as to the liability of a licensed publican to supply reasonable refreshments to all comers?

CERTIORARI.

Motion to make absolute, notwithstanding cause shown, a conditional order for a writ of *certiorari* directed to Justices of the county Antrim to remove and quash an adjudication by them at the Annual Licensing Petty Sessions for Belfast City, on the 30th September, 1899, granting the application of R. G. Dunville and four others, trading as Dunville & Co., Limited, for the certificate required for the purpose of obtaining "a licence for the sale of spirits to be consumed on the premises in the house and premises 8 and 10, Calendar-street, and 25 to 35, Arthur-street, Belfast," on the ground of want and excess of jurisdiction, and that "the premises not having been used as licensed premises in the year last immediately preceding it was not within the competence of the Justices to grant a certificate to the good character of the applicants, or that the said house was conducted in a peaceable and orderly manner within the meaning of the statutory provisions in that behalf."

The conditional order was obtained on the affidavit of H. B. Morell, District Inspector of Police, which stated that at the Belfast Annual Licensing Petty Sessions on the 30th September, 1899, R. G. Dunville and four others, trading as Dunville & Co., Limited, of 8 and 10, Calendar-street, and 25 to 35, Arthur-street, in the City of Belfast, applied for the certificate (required by

Q. B. Div. 1900.

THE QUEEN v. JUSTICES OF ANTRIM.

17 & 18 Vict. c. 89, s. 11), for the purpose of obtaining a renewal of the licence as publicans which they had held for some years in respect of the house and premises ["8 and 10, Calendar-street, and 25 to 35, Arthur-street."] The District Inspector had served notice of his intention to oppose the application on the ground that the business contemplated by the licence for the consumption of beer and spirits on the premises had not during the past year been carried on in the premises. He stated that, on the hearing of the application, evidence was given for the objector that the applicants, Dunville & Co., who were long established distillers and wholesale wine and spirit merchants, carrying on business on the premises mentioned, had not used and did not use the premises as a public-house for the sale by retail of intoxicating liquors for consumption on the premises, or at all as a public-house; that it was not disputed that the business there carried on was of a wholesale character, and that it was not disputed that they did not *to any appreciable extent* (1) sell intoxicating liquor by retail for consumption on the premises, or use the premises for the purpose of such retail trade, and that they had not their names affixed on the premises with the additions prescribed by sect. 11 of the Licensing Act, 1872, and sect. 26 of the Licensing Act, 1874. The affidavit referred to and verified a summarised note of the evidence given before the Justices, from which it appeared that evidence was given by Sergeant Martin, R.I.C., to the effect that the applicants were large distillers selling whiskey wholesale; that the premises in Arthur-street consisted of a set of offices resembling a bank in appearance; that the statutory notice was not over the door; that there was no bar or drinking accommodation as far as witness could see, and no appearance that the business of a public-house was being carried on there for consumption of liquor on the premises; (cross-examined) there was a counter there at which drink could be served if it were there, but there was no drink behind the counter; there was no bar; there was no place where measures and glasses and liquor were kept for people coming in. Witness had been in a small private room, in part of the premises,

(1) These words were interpolated after engrossment, as appeared by the jurat.

where there were glasses and measures. It was one of the conditions on which the licence was granted by the Recorder of Belfast, that no bar should be put up on the premises. Hugh F. Garrett, one of the applicants, and a managing director of the firm, (examined) stated that the firm carried on a large business for the supplying of families, a large family business; that it was a considerable portion of their business to supply spirits to customers in quantities between two gallons and two quarts, pretty nearly a daily occurrence; that they had never refused any person who asked for drink to be consumed on the premises; that they had a place for supplying them, glasses, measures, and drink; that any person who came in there with the money would be supplied provided he was sober; that they did not cater for a large public-house trade; (cross-examined) there was no notice above the door that they carried on the business of retail publicans; and that he could not say how many half-glasses of whiskey they had supplied on the premises during the last twelve months, about half a dozen he believed.

Mr. Garrett, in an affidavit filed as cause, stated that the firm had held a publican's licence for a period of some thirty-five years; that on the occasion in question the only opposition offered was by the District Inspector of Police, who had made unsuccessfully a similar objection in the years 1896, 1897, and 1898; that he was examined, and deposed that his firm had never refused to supply any person who asked for drink for consumption on the premises, and that there was there a place provided with glasses, measures, and spirits, for supplying such persons, and that any person coming there would be supplied, provided he was prepared to pay, and was sober; and that during the past year "some customers were supplied with drink for consumption on the premises; that it was untrue that the firm had not used, or did not use, the said premises as a public-house for the sale by retail of intoxicating liquors for consumption on the premises, or at all as a public-house"; and that so far from there being no dispute upon the question at the hearing, it was contended and proved on behalf of the firm that, in addition to carrying on the business of wholesale wine and spirit merchants, they also carried on at the premises the business of selling intoxicating liquors by retail for consumption

Q. B. Div. 1900.

THE QUEEN v. JUSTICES OF ANTRIM.

on the said premises, and during the year then last past supplied various customers with intoxicating liquor for consumption on the premises, and used the said premises for the purpose of such retail trade, and for supplying customers with quantities of spirits between two quarts and two gallons. [Save as above, the affidavit did not qualify or dispute the correctness of the note of the evidence.]

E. Morphy, for the objector below (Morell):—

There was an utter absence of evidence before the Justices "as to the peaceable and orderly manner in which such house had been conducted in the past year" (17 & 18 Vict. c. 89, sect. 11), that is, conducted as ordinary licensed premises. The house was not a "house," but a block of buildings "like a bank"; it was not in any sense "a public-house," or conducted as such; there was no bar, no drinking accommodation or invitation to the public; no notice (as required by 35 & 36 Vict. c. 94, s. 11) affixed to the premises; no desire to trade as publicans; and, even on the applicants' own showing, no sales save of half a bottle in the whole year. *Reg.* (*Lambe*) v. *Justices of Co. Armagh* (1), and *Reg.* (*Cox*) v. *Recorder of Dublin* (2), are, therefore, binding authorities that it was not competent to the Justices to grant their certificate.

Hume, *Q.C.*, and *Chambers*, for the applicants below:—

As to the "notice" required by the Act of 1872, it is stated in Sir A. Reed's book on the Licensing Laws (p. 105), that "there is a police arrangement throughout Ireland by which this provision" is not enforced in the case of hotels which have not a common bar or tap room. [PALLES, C.B.: By what authority do the police claim to exercise this dispensing power?] The practice probably corresponds with that of granting "ordinary licences" to hotels, &c., upon an undertaking (as was in fact given in this very case to the Recorder of Belfast), that an ordinary

(1) [1897] 2 I. R. 57. (2) 16 L. R. Ir. 424.

public-house bar should not be opened upon the premises (1). The undertaking may be unenforceable: *Lambe's Case* (2), and *Cox's Case* (3)—but, if given to the Justices, it would seem unreasonable that the licence-holder should be penalised for its observance. The absence of such notice can, however, be only considered here if the question becomes one of the weight of evidence; and, once that is at issue, it is not for this Court to interfere.

The ordinary licence entitles the holder to sell intoxicating liquor for consumption "on *or* off the premises." The present applicants have exercised the right in both its branches. The evidence of sales for consumption *on* the premises is slight no doubt; but still, once it is admitted that there is evidence, it would be to transgress the settled principles of this Court to interfere, upon a purely discretionary matter, with the determination, upon a question of fact and evidence, of the Justices. The prosecutor's affidavit pointedly admits that there was *some* evidence, because it appears by the *jurat* that he found himself unable to swear that there were no sales for consumption on the premises. If the sale of six half glasses in the year is not sufficient to establish a technical carrying on of business, what is to be the minimum? and is it for this Court, not for the Justices, to fix it? If a publican be boycotted, or if his charges be prohibitive, or if for any reason more than six customers do not come, must the publican lose his licence by operation of law? Such a matter is, we submit, a matter for the discretion of the Justices upon the facts before them, and this Court should decline to interfere: *Re Dillon* (4). In *Reg.* (*Lambe*) v. *Justices of Co. Armagh* (2), there was no evidence whatsoever of any sale for consumption on the premises, nor was there any such evidence in *Reg.* (*Cox*) v. *Recorder of Dublin* (3). These cases are therefore distinguishable from the present. In *Reg.* (*Jones*) v. *Justices of Kerry* (5), this Court distinguished *Lambe's Case* (2) upon this very ground.

(1) See 43 & 44 Vict. c. 20, s. 43, which was not referred to in the argument, nor in the argument in *Lambe's Case*.—REP.

(2) [1897] 2 I. R. 57.
(3) 16 L. R. Ir. 424.
(4) 11 Ir. C. L. R. p. 235.
(5) 31 Ir. L. T. R. 47.

Q. B. Div. 1900.

THE QUEEN v. JUSTICES OF ANTRIM.

But, at all events, it cannot be disputed that the applicants have exercised the right conferred by the "ordinary licence" in its other alternative branch, for the sale of spirits *off* the premises in quantities between two quarts and two gallons. Under no other existing licence, as the law now stands, is the sale of spirits, between these limits, legal. A "*wholesale licence*" only authorises a dealer to send out and deliver spirits in quantities not less than two gallons: see the Spirits Act, 1880 (43 & 44 Vict. c. 24), section 102—"A dealer must not unless he has an additional licence authorising him so to do, or is also licensed as a retailer, sell, send out, or deliver spirits in any less quantity than two gallons of the same denomination at a time for the same person"; and section 104—"the sale of spirits in any quantity less than two gallons, or less than two dozen reputed quart bottles shall be deemed sale by retail." A *spirit grocer's licence* only authorises sales of spirits, for "consumption off," in less quantities than two quarts: Spirit Grocers (Ireland) Act, 1845 (8 & 9 Vict. c. 64), section 1.

The term "public-house" does not occur in the licensing code, and the popular associations of that word cannot find a place in any legal consideration of the provisions of the statutes. Here there was never, as there was in *Lambe's Case* (1), a refusal to supply drink to any person demanding same; but the licence, being of a privilege or right, does not apparently impose any liability to supply drink to all comers (see *per* Holmes, L. J., in *Lambe's Case* (1); and we submit that the exercise of that right or privilege is sufficiently shown by the conduct of the premises as licensed premises, *either* for consumption *on* the premises, *or* for consumption *off* them. Otherwise, in the absence of evidence of sales for consumption *off* the premises, or for *off* consumption in quantities between two gallons and two quarts, the Justices could not grant a certificate, however great an "on-trade" there admittedly might be.

Not merely are *Cox's Case* (2) and *Lambe's Case* (1) distinguishable on the ground that there was an absolute absence of evidence of any trade being there carried on under the licence,

(1) [1897] 2 I. R. 57. (2) 16 L. R. Ir. 424.

but it is clear that in neither case was the position now contended for argued at the bar or considered by the Court. This, in *Cox's Case* (1), is quite evident from the judgment of Lord Morris (2). [Counsel also referred to *Re Jury* (3), and *Reg.* v. *Bolton* (4).]

Morphy, in reply.

PALLES, C. B. :—

This is an application for a *certiorari* to bring up for the purpose of being quashed a certificate of Justices under 17 & 18 Vict. c. 89, sect. 11, certifying that the house of the applicant has been conducted in a peaceable and orderly manner during the preceding year.

It has been decided by a number of cases that the words "the peaceable and orderly manner in which such house has been conducted" involve that it has been conducted as a licensed house, and consequently that, if the house has not been so conducted, there is no subject-matter to which "peaceable and orderly manner" can be applied.

It has also been decided that the character of the conduct of the licensed house is not part of what are sometimes called the *merits* of the application, but is matter preliminary to the jurisdiction of the Justices. The decisions upon these two questions are binding upon us. The question here therefore is, is there evidence that this house has been conducted during the year in question as a licensed house?

The evidence relied upon for the applicants is that of Mr. Hugh Garrett, one of the directors of the applicant company. He says that his firm carry on "a large family business"; that it is "a considerable portion of their business to supply to customers between two gallons and two quarts"; it is "pretty nearly a daily occurrence."

That refers to spirits not intended to be consumed upon the premises. Then, as to sale for consumption upon the premises, he says:—"We have never refused any person who asked for drink

(1) 16 L. R. Ir. 424.
(2) *Ibid.* p. 434.
(3) 30 Ir. L. T. R. 172.
(4) 1 Q. B. 66.

Q. B. Div. 1900.

THE QUEEN v. JUSTICES OF ANTRIM.

Palles, C.B.

to be consumed on the premises. We have a place for supplying them, glasses, measures, and drink. Any person who comes in there with the money will be supplied, provided he was sober. We do not cater for a large public-house trade. . . . During the last twelve months I could not say how many half-glasses we supplied on our premises. I believe about half-a-dozen."

Now, in my opinion, the supplying of half-a-dozen half-glasses of drink for consumption on the premises during a period of twelve months, unless there is something very special in the case, is not carrying on the trade of selling liquor for consumption on the premises. *De minimis non curat lex.* I do not, however, lay down as a proposition of law that the sale of even that quantity of liquor might not under peculiar circumstances be held to be a carrying on of such a trade. In every case its particular circumstances must be looked to.

But, in the present case, it is apparent that not only was the principal trade the supplying of drink which was not to be consumed on the premises, but also that—whilst the applicants were unwilling actually to refuse drink to be consumed upon the premises, were it applied for—they were not anxious to do so, nor were they willing to do so, until forced by actual demand. In my opinion they did not hold this house out to the public as a licensed public-house; and the extremely small trade in drink sold to be consumed on the premises was not caused by any absence of wish of the public in that part of Belfast to be supplied, but by the desire of the applicants to refrain as far as possible from carrying on that trade, and by their action consequent thereon. They have succeeded so effectually in their desire that in substance and reality they have not carried on that trade at all.

I therefore hold that this house has not been conducted as a licensed house for the consumption of spirituous liquors *on the premises* during the preceding year.

Thus the question for determination comes to this: Is the conduct of a house for the sale of spirituous liquors to be consumed off the premises, including the sale of such quantities thereof as can be sold only under an ordinary public-house licence, viz. from two quarts to two gallons, the conducting of the same as a licensed house, which, if peaceable and orderly, entitles the person

conducting it to a certificate under 17 & 18 Vict. c. 89, sect. 11. ?

I regard this as a question of extreme importance, because its ultimate determination in the negative will give to houses licensed under the Act of 1833 the monopoly of sale for consumption off the premises of spirits by retail in quantities between two quarts and two gallons.

Before, however, I consider this question, I must be satisfied that having regard to previous decisions binding on me, I am not precluded from determining it.

It has been contended for the Crown that the very question has been decided in the case of *Reg.* (*Cox*) v. *Recorder of Dublin* (1), and, upon consideration, I am of of opinion that they are right in this contention.

I have obtained from the Crown Office the affidavits filed in that case, and I find the following statement in the second paragraph of the affidavit of William Watson :—

"With respect to paragraphs 3 and 6 of the said affidavit, said William J. Cox is in error in stating that, 'for a long series of years the premises for which the transfer was sought had not been used for the sale of liquor by retail for consumption on the premises,' for I say that—although the former firm . . . and the present, which consists of Henry Morris and myself, also trading under the name of William Russell & Company, *carried on the business of family grocers, wine and spirit merchants*—the rights and privileges under said licence, viz. the sale of drink on the premises, were exercised by both the said firms from time to time."

The fact, therefore, that Messrs. Russell's trade included the sale by retail of drink to be consumed off the premises was before the Court of Appeal, and I must take their decision as referable to that fact amongst others. The Judges who gave judgment there were Naish, C., Morris, C.J., and Fitz Gibbon and Barry, L.JJ. In his judgment there the Lord Chancellor says :—

"In *Clitheroe's Case*(2), moreover, the house was a house which was being actually and *bonâ fide* used as a public-house. *Here this is not so. The licence in the present case, so far as the evidence goes, does not appear to have been ever used.* It may have been used at some distant period,

(1) 16 L. R. Ir. 424. (2) I. R. 11 C. L. 412.

Q. B. Div. 1900.

THE QUEEN v. JUSTICES OF ANTRIM.

Palles, C.B.

but the house in question had for all practical purposes *ceased to be a public-house*. . . . The circumstances of Mr. Russell's house having *ceased* for many years *to be a public-house* establishes a broad distinction between the two cases. As I have said, the Justices are required, in the case of a new licence, to consider the number of previously licensed public-houses in the neighbourhood. In the present case, if an application had been made, say five years ago, in this neighbourhood, for a new licence, the Justices, in considering the requirements of the neighbourhood, would naturally no more consider this house as a public-house than they would any other house in Sackville-street not made use of as such; and if we were to hold that this, and any number of similarly situated houses were now entitled, as of right, to obtain licences, it would follow that the precaution, which the Legislature took for the purpose of limiting the number of public-houses, of requiring that regard should be had to the requirements of the neighbourhood, would be disappointed."

It is impossible to read these words without seeing that the *ratio decidendi* was that the user of premises for the trade of a family wine merchant, where drink was sold to be consumed off the premises, was not a user of it as a licensed house within the meaning of the Licensing Act, 1833 (3 & 4 Wm. 4, cap. 68); and, viewing it in that light, the case is an exact decision upon the point in controversy here, that selling for consumption *off* the premises, where there is no sale for consumption *on* the premises, is not conduct of the premises as a licensed house. I am willing to admit that there is much force in Mr. Hume's argument that the Lord Chancellor was not accurate in stating that "the licence . . . does not appear to have been ever used"; because the sale by retail off the premises in quantities between two quarts and two gallons was authorized solely by that licence; but that circumstance affords no justification to me to act against the express decision.

Amongst the circumstances relied on by Lord Morris in his judgment was the fact that the licence had "remained in a state of suspended animation for years"; and that "the application to the Recorder was, in substance as in form, an application for a new licence."

Lord Justice Fitz Gibbon says:—

"In this case Mr. G. Mooney has no licence, and no operative licence has for many years back been in use upon the premises. I decline to admit that

the magistrates were at liberty to act on the certificate to the peaceable and orderly manner in which the house had been conducted in the past year, when the house was *not*, in fact, *conducted as a public-house at all.* . . . The public must be thought of as well as the publican, and unless they have been accommodated during the year the certificate that the house has been 'conducted' as the statute contemplated, namely, as a house *used for the sale of spirits, &c.* to be *consumed on the premises*, cannot properly be given."

To my mind that case is an express authority upon the question sought to be argued. It is said that upon the argument in *Cox's Case* (1) this question was not argued by counsel; that it was first suggested in the judgment of the Court; and that no reference there was made to the fact that spirits in quantities between two quarts and two gallons cannot legally be sold save under such a licence as was there and is here in question—the licence called the ordinary publican's licence. I know not whether that is so or not; but we are not at liberty to enter upon such considerations at all. If they are to be considered, the consideration of them must be in the Court of Appeal. I hold that this Court is absolutely bound by the decision in *Cox's Case* (1), and I altogether decline to enter upon the question there decided.

For these reasons the conditional order must be made absolute.

JOHNSON and KENNY, JJ., concurred.

GIBSON, J.:—

There is one point upon which I wish to guard myself. It has been suggested that a publican is not under any duty to supply the public with refreshments. The point was hardly argued in *Reg.* (*Lambe*) v. *Justices of County Armagh* (2), where Holmes, L.J., indicated that his opinion was rather against the existence of any such duty. I have looked into the matter, hastily, during the argument, and think that the point may be worthy of fuller discussion. So far back as Dalton's Justice, chapter 7, I find that inn-holders, alehouse-keepers, and other victuallers, are treated as under the same liability: Dalton's Justice (Ed. 1715, p. 30); and in Burn's Justice of the Peace (Ed. 1845, vol i., pp. 82, 115) it is apparently assumed that a publican and an innkeeper are

(1) 16 L. R. Ir. 424. (2) [1897] 2 I. R. 57.

Q. B. Div. 1900.

THE QUEEN v. JUSTICES OF ANTRIM.

Gibson, J.

both in the same position. The innkeeper professes to accommodate the public, and it may be that a publican is under the same kind of responsibility with regard to the business he professes to carry on. I do not wish, however, to do more than show that the point is not decided now. Perhaps some assistance may be got from the well-known boycotting case which was decided some years ago in this Court. See also the *Six Carpenters' Case* (1), where inns and taverns are placed on the same footing; Bacon's Abridgment, Title "Inns (C)"; and the analogy of common carriers who, according to the notes to *Coggs* v. *Bernard* (2), are bound to convey the goods of anyone ready to pay the hire.

Solicitor for the applicant (Morell): *J. Carr.*
Solicitor for the respondents: *A. Barr.*

A. E. R. J.

(1) 1 Smith's L. C. 127. (2) 1 Smith's L. C. 167.

GUINNESS *v.* CARAHER (1).

(1900. No. 2,375.)

Appeal.
1900.
April 20.

Practice — Writ specially endorsed — Ejectment for non-payment of rent — Motion for final judgment — Amendment of endorsement — R. S. C. I., Order XIV., Rule 1, *Order III., Rule* 6.

In an action to recover possession of land for non-payment of rent, by W. F. G. as plaintiff, against J. C. as defendant, the endorsement of the writ stated that the plaintiff's claim was to recover possession of the house No. 13 M. Square, Dublin, and that one year's rent was due, £90. On a motion for final judgment, leave was given to the plaintiff to amend the writ, and to sign final judgment for recovery of possession, with costs of the action and of the motion. The endorsement of the writ as amended stated that the plaintiff claimed to recover possession of the house 13 M. Square, Dublin, held from the plaintiff's predecessor under lease dated the 13th October, 1882, made between W. N. G. and E. C. at the rent of £90, that one year's rent was due, of which the particulars were given, and that all the lessor's interest was vested in the plaintiff.

Held (reversing the decision of Boyd, J.), that the writ as amended was not specially endorsed; and

Held, also by Fitz Gibbon, Walker, and Holmes, L.JJ., that the plaintiff should not have been allowed, at the time of moving for judgment, to amend so as to change an ordinary writ into a specially endorsed writ.

MOTION for final judgment under Order XIV., R. 1, in an action of ejectment for non-payment of rent by William French Guinness against James F. Caraher and others. The writ, as originally issued and served, was endorsed as follows:—

STATEMENT OF CLAIM.

The plaintiff's claim is to recover possession of ALL THAT AND THOSE, the house and premises, No. 13, Mountjoy-square, situate in the parish of St. George and County of the City of Dublin, for non-payment of the rent thereof. And the amount of rent now due is as follows:—

1899, Nov. 1. One year's rent due to this date, £90.

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER, and HOLMES, L.JJ.

Appeal. 1900. GUINNESS v. CARAHER.

The writ was signed by a solicitor, and he claimed £1 10s. for costs. It appeared from the affidavit filed by the plaintiff, that, by lease dated the 13th October, 1882, the Rev. William N. Guinness let the house, 13, Mountjoy-square, to Edward Caraher for 100 years, from the 1st November, 1881, at the rent of £90. Edward Caraher the lessee died on the 5th January, 1900, and no personal representative had been raised to him.

James F. Caraher the defendant filed an affidavit, in which he stated that he was in possession: he also stated that he never was tenant or paid any rent. The motion came before Boyd, J., on the 21st March, 1900, when he made an order that the plaintiff be at liberty to amend the statement of claim endorsed on the writ by stating therein the tenure of the premises, and thereupon that the plaintiff be at liberty to sign final judgment against the defendant for recovery of possession of the house and premises, with costs of suit, and £4 4s., costs of motion. The endorsement on the writ as amended, was as follows :—

STATEMENT OF CLAIM.

The plaintiff's claim is to recover possession of ALL THAT AND THOSE, the house and premises, No. 13, Mountjoy-square, situate in the parish of St. George, and County of the City of Dublin, held from the plaintiff's predecessor under lease dated the 13th October, 1882, made between the Rev. William N. Guinness of the one part and Edward Caraher of the other part, at the yearly rent of £90, payable half-yearly, on every 1st May and 1st November. And the amount of the rent now due is as follows:—

1899, Nov. 1. One year's rent due to this date, £90.

All the lessor's interest is now vested in plaintiff.

The defendant appealed.

J. R. Stritch, Q.C., and *A. R. Stritch*, for the appellant:—

We submit that the Court had no power to amend an ordinary writ into a specially endorsed writ. This writ, as originally served, did not contain any of the averments necessary to make it a specially endorsed writ, because it does not connect the defendant with the lease, or state that he was in possession.

Even as amended, we submit that the writ is not specially endorsed: *Cullen* v. *Jackson* (1); *Rochfort* v. *Somers* (2); *Seaton* v. *Clark* (3).

Conner, Q.C., and *W. H. Boyd*, for the respondent:—

If a writ contains all the averments necessary to make it specially endorsed within Order III., Rule 3, the Court has full power to amend under Order XXVIII.; *Satchwell* v. *Clerke* (4); *Roberts* v. *Plant* (5). This writ as amended is specially endorsed: *Levin* v. *Ribton* (6).

LORD ASHBOURNE, C.:—

I do not think that any member of the Court has any doubt as to the proper order to be made in this case. The action was brought to recover possession of a house in Mountjoy-square by W. F. Guinness as plaintiff, against James Caraher and others as defendants. The endorsement on the writ, as it originally stood, commences with the words, "Statement of Claim," and it states: "The plaintiff's claim is to recover possession of all that and those, the house and premises, No. 13, Mountjoy-square, situate in the parish of St. George and city of Dublin, for non-payment of the rent thereof." And then it states the amount of rent due, one year's rent, to the 1st November, 1899, £90; and it is signed at the foot by the solicitor. The plaintiff moved for judgment upon that as a specially endorsed writ before Boyd, J. It turned out upon the motion that this very meagre statement on the endorsement on the writ did not set forth the facts of the case. It was not the case of a letting between the plaintiff and defendant; it was a case in which, by a lease of 1882, this house was let by a person other than the plaintiff to a person other than the defendant. Boyd, J., made an order, "that the plaintiff be at liberty to amend the statement of claim endorsed on the writ by stating therein the tenure of the premises sought to be recovered in this action, and thereupon that the plaintiff be at liberty to sign final judgment against the defendant for the recovery of the house

(1) [1894] 2 I. R. 17 (note).
(2) [1895] 2 I. R. 45.
(3) 28 L. R. Ir. 514.
(4) 66 L. T. 641.
(5) [1895] 1 Q. B. 597.
(6) 3 I. W. R. 88.

Appeal. 1900. GUINNESS v. CARAHER. Lord Ashbourne, C.

and premises." I pass by for the purposes of my decision whether this was a case where such an amendment should have been sanctioned. I do not enter into that matter, but I deal with the endorsement as amended, when the plaintiff, availing himself of the power of amendment given by Boyd, J., amended the endorsement as follows:—"The plaintiff's claim is to recover possession of all that and those, the house and premises, No. 13, Mountjoy-square, in the parish of St. George and city of Dublin, held from the plaintiff's predecessor under lease dated the 13th October, 1882, made between the Rev. William N. Guinness of the one part and Edward Caraher of the other part, at the yearly rent of £90, payable half-yearly. And the amount of rent now due is as follows:—1899, November 1st, one year's rent to this date, £90. All the lessor's interest is now vested in the plaintiff."

Is the plaintiff entitled to succeed upon that? There is not a word to bring the defendant into connexion in any form with the premises, nor is there anything to show why the defendant's name was to be in the writ more than that of any other person. It is not stated that the defendant is in possession, or that he is tenant of the premises demised; he is not brought into privity with the lease, and there is no statement as to why he should be liable for costs. Unless there is some statement bringing him into touch with the plaintiff, *Cullen* v. *Jackson* (1) is an authority against the plaintiff's contention, and the decision of O'Brien, Johnson, and Holmes, JJ., in that case is against this being regarded as a specially endorsed writ. The case of *Rochfort* v. *Somers* (2) does not purport in the least to alter the effect of the decision in *Cullen* v. *Jackson* (1), and it certainly does not decide that in a specially endorsed writ in ejectment, the plaintiff can omit all reference to the defendant. On the contrary, the writ in that case stated that the lands were held from the plaintiff by the defendant under a lease, and when Kenny, J., at the end of his judgment came to sum up his propositions, he stated that, in his opinion, the writ in that case sufficiently alleged—(1) a subsisting lease; (2) that the lands were held under that lease; and (3) that the plaintiff was the person entitled to recover the rent payable under that

(1) [1894] 2 I. R. 16 (note). (2) [1899] 2 I. R. 45.

lease. Of course, Kenny, J., must be taken to have stated these propositions, having regard to the facts of the case before him, a case in which the writ contained the averment that the lands were held from the plaintiff by the defendant under the lease, which I apprehend to amount to his second proposition, that the lands were held by the defendant under the lease.

For these reasons I am of opinion that the appeal should be allowed, and with costs.

FITZ GIBBON, L.J. :—

In practice cases we must be careful not to limit the beneficial operation of the Rules of Court unnecessarily, and I therefore give my reasons for believing that we have clear and satisfactory grounds for our decision in the present case. The power of marking final judgment in a summary way was intended for clear and simple cases only. This power was extended by Order III. Rule 6, to actions of ejectment, such as this is ; but if the plaintiff wants to get summary judgment he must exercise the option given to him by the Order, of specially endorsing his writ, and he must do this at the issue of the writ, and before it is served on the defendant. Furthermore, the special endorsement *must* be "to the effect of" the appropriate form in Appendix C. I have no hesitation in holding that this option cannot be exercised for the first time after service. If a plaintiff has issued and served an ordinary writ, not specially endorsed, that writ cannot afterwards be changed into a specially endorsed one. I do not dispute, nor do I desire to define, the power to *amend*; I deny the power to *create* a specially endorsed writ after service. In the present case I do not shut my eyes to the fact that the writ has the words "Statement of Claim" at the top, and the name of the solicitor at the foot ; and, in the case of liquidated demands, this may often be the only difference of form between an ordinary and a specially endorsed writ. These requirements were introduced for the purpose of securing at least two visible signs that a writ was specially endorsed, but they did not relieve the plaintiff from the obligation to satisfy the equally essential condition of inserting in the body of the writ all the averments necessary to give to the writ "the effect" of the applicable form. Reference to the Schedule shows that the form

Appeal. 1900.

GUINNESS v. CARAHER.

Fitz Gibbon, L. J.

prescribed for this case is Form No. 2, Section vii., which specifies the tenure. Therefore this writ did not comply with the Rule, and was not specially endorsed, notwithstanding the fact that "Statement of Claim" was at the top of it, and the solicitor's name at the foot.

But apart from form, this writ is not in substance "specially endorsed." The body of a specially endorsed writ must contain all the statements necessary to show a specific cause of action. If it does not, summary judgment can not be given. What is the very first necessary matter? To show that the defendant has something to do with the case. The writ as amended is, in this respect, as defective as the writ as served. The defendant here, on the writ, is not shown to have anything to do with the lands claimed. In ejectment the defendant must be shown to be somehow connected with the case: it may be enough if he is in possession. But this writ, even as amended, does not even allege that; and the order appealed from gives final judgment not merely for the possession of the premises, but for the costs of the action, against a person of whom nothing appears except that his name is Caraher, and against whom it is not alleged that he has ever had anything to do with the case.

On the ground that this writ—even as amended—does not show any cause of action at all against the defendant, and is not to the effect of the prescribed form, I hold that it is not specially endorsed, and that the motion for judgment ought to have been refused.

On the question of amendment, I hold that as the writ as issued was not specially endorsed, it could not be changed into a specially endorsed writ without re-service, and on the motion for judgment, by amendment, for this would be to enable the plaintiff to issue an ordinary writ, and afterwards to move for summary judgment, and to exercise the option of specially endorsing his writ at the time of getting judgment.

I agree that this appeal must be allowed.

WALKER, L. J.:—

I concur, upon three grounds—1, In my opinion the writ was not a specially endorsed writ when originally issued; 2, I think

that it could not be amended in essential particulars so as to make it one; and 3, I think that, when amended into its present form it did not become a specially endorsed writ.

The writ as originally issued contained some of the ingredients which go to make up a specially endorsed writ. It had the words "Statement of Claim" at the top of it, and it was signed by a solicitor. But every averment necessary to make it a specially endorsed writ between those two was wanting. Therefore it was not a specially endorsed writ. If the plaintiff's contention is sound it follows that every writ to recover possession of land, on the ground of rent being due, may be launched in the form of what is in substance an ordinary writ, and then changed into a specially endorsed one, when the plaintiff comes to move for judgment.

The plaintiff is bound to exercise an option under Order III., R. 6, as to which form of writ he will issue. Where does the option come in, if a writ can be issued in the ordinary form first and changed afterwards into a specially endorsed one? There is then no option at all exercised. I think if a plaintiff has issued what is in substance a specially endorsed writ, there is a power to amend, but he cannot change an ordinary writ into a specially endorsed one by supplying the substantial particulars. Lastly, when the amendment was made, I think it was still defective, because the averment that the defendant was in possession was omitted, a most material statement for the writ to contain.

HOLMES, L. J.:—

A statement of claim endorsed on a writ of summons may be amended like any other statement of claim; and on a motion for judgment the Court often exercises its discretion in allowing an omission to be supplied or an averment to be struck out or altered by way of amendment.

But I am of opinion that the order allowing the amendment in this case is wrong in principle, inasmuch as to enable a plaintiff to obtain a summary judgment for possession, it has changed the whole character of the endorsement on the writ. The writ as issued and served had no resemblance to a specially endorsed writ in an action of ejectment for non-payment of rent.

Appeal. 1900. GUINNESS *v.* CARAHER. Holmes, L.J.

The endorsement on such a writ must by the terms of Order III., Rule 6, be in substance and effect similar to the form set forth in the appendix therein referred to. I have pointed out during the argument that all the essential averments of that form are omitted in the original endorsement in this case, and that the form used is that which is employed where the writ is intended to be followed by a statement of claim.

In such a case it is certainly contrary to practice to permit on a motion for judgment an amendment such as was allowed by Mr. Justice Boyd. It seems to me to be also opposed to legal principle to do so. The plaintiff was given a right to obtain summary judgment, provided the writ of summons is specially endorsed. Can such a right be claimed by a plaintiff who deliberately rejects the appropriate form and uses instead the form of general endorsement? I think not; and I think that he cannot have his position bettered by permitting him on the hearing of an application, which when made was untenable, to amend by essentially altering the character of the endorsement. I am prepared to allow the appeal on this ground alone. I may, however, add that I agree with my brethren in holding that the endorsement as amended is not sufficient. The form referred to in Order III., Rule 6, shows, I think, that a special endorsement in an action of ejectment for non-payment of rent ought to state some connexion between the defendant and the cause of action. Even if his title is not known to the plaintiff there ought at the least to be a statement that he is in possession. It is possible that what I have now said does not apply to agricultural and pastoral holdings which are the subject of subsequent rules; but the premises in this case is a house in the city of Dublin, and I am not aware that there is any rule applicable thereto modifying Order III., Rule 6.

Solicitors for the plaintiff: *William Fry & Son.*
Solicitor for the defendant: *J. R. Stritch.*

R. D. M.

OWENS *v.* THE QUEEN (1).

Q. B. Div. 1899.

Nov. 1, 2, 29.

The National School Teachers (Ireland) Act 1879 (42 & 43 *Vict. c.* 74)—*Statute, interpretation—Statutory rules—Power to alter such rules—Delegation of legislative authority*—Ultra vires—*Petition of Right—Costs of the Crown* (23 & 24 *Vict. c.* 34, *s.* 11).

The National School Teachers (Ireland) Act, 1879, created a pension fund for teachers who should elect to accept its benefits in lieu of the gratuities which under the former system they might have been granted on superannuation. This fund consisted of a Parliamentary grant supplemented by contributions or deductions from the teachers' salaries. Under the Schedule Rules (which by s. 11 were to be construed and to have effect as part of the Act) a quarterly deduction of 9*s.* 9*d.* entitled teachers in the suppliant's position to a pension of £88 on retirement at the age of 65. Section 6 provided that all questions of pension should be determined by the Treasury; and s. 11 that the Schedule Rules might "from time to time be revoked, varied, and added to by the Lord Lieutenant with the consent of the Treasury."

In 1885, the Lord Lieutenant, with the approval of the Treasury, made new Rules under the Act, reducing the amount of the teachers' contributions. In 1897, finding that the previous bases of calculation in 1879 and 1885 were founded on mistake and error, and that the fund was deficient, the Lord Lieutenant, with Treasury approval, made new Rules increasing the teachers' contributions, in the case of the suppliant and others in the like position, to 17*s.* 11*d.* a quarter.

The suppliant objected, and presented a petition of right, alleging a binding contract in 1879, between the Treasury and the suppliant, that, on the basis of the schedule deductions of 1879, the suppliant should be entitled to a pension of £88 on retirement, and alleging that, unless with his consent, this contract could not be varied, and further that the Rules of 1897 were *ultra vires*.

Held, that, notwithstanding sect. 6 of the Act, the Court had jurisdiction to entertain the question of the validity of the Rules of 1897, but that these Rules were not *ultra vires*, and that judgment should accordingly be entered for the Crown.

Held, further (*diss.* Sir P. O'Brien, L.C.J.), that, even under the circumstances, the Court had no discretion to refuse costs against the unsuccessful suppliant.

(1) Before SIR P. O'BRIEN, L.C.J., and JOHNSON, MURPHY, and GIBSON, JJ.

Q. B. Div. 1899.

OWENS v. THE QUEEN.

NEW TRIAL MOTION.

The National School Teachers (Ireland) Act, 1879, created a Pension Fund for teachers who should elect to accept its benefits in lieu of the gratuities which under the former system they might have been granted on superannuation. This fund consisted of a Parliamentary grant, supplemented by contributions or deductions from the teachers' salaries. Under the Schedule Rules (which by sect. 11 were to be construed and to have effect as part of the Act) a deduction of 9*s.* 9*d.* entitled teachers in the suppliant's position to a pension of £88 on retirement at the age of sixty-five. Sect. 6 provided that all questions of pension should be determined by the Treasury; and sect. 11 that the Schedule Rules might "from time to time be revoked, varied, and added to" by the Lord Lieutenant with the consent of the Treasury.

In 1885 the Lord Lieutenant, with the approval of the Treasury, made new Rules under the Act, reducing considerably the amount of the teachers' contributions. In 1897, finding that the previous bases of calculation in 1879 and 1885 were founded on mistake and error, and that the fund was deficient, the Lord Lieutenant, with Treasury approval, made new Rules increasing the teachers' contributions, in the case of the suppliant and others in the like position to 17*s.* 11*d.*

The suppliant objected, and presented a Petition of Right, alleging a binding contract in 1879 between the Treasury and the suppliant that on the basis of the schedule deductions of 1879 the suppliant should be entitled to a pension of £88 on retirement, and alleging that unless with his consent this contract could not be varied; and further, that the Rules of 1897 were *ultra vires.*

The petition was tried before Mr. Justice Madden without a jury on the 1st May, 1899. The pleadings and the various documents, including letters and reports in evidence, or accepted by consent as evidence, are sufficiently referred to in the judgments. At the trial the suppliant, Patrick Owens, examined, stated that he was appointed a teacher in 1872, and in 1877 became a principal teacher of the 1st Division of the 1st Class, and agreed to the various "stoppages"—9*s.* 9*d.* down to 1886, and 8*s.* 9*d.* thenceforward to 1st January, 1898. He refused to pay the increased premiums or "stoppages" for 1899 under the new Rules

promulgated in 1897, and had since received his salary, less the new deductions, under protest. He had no knowledge at any time of the calculations on which the pension fund was based. His salary (£70 in 1880) had been increased (by 20 per cent.) to £84 under the Act of 1892 (55 & 56 Vict. c. 42, sched. 4). The learned Judge reported that to prevent interruption of the business at *Nisi Prius* he had, by consent, left the suppliant to move the Court for such relief as he might be entitled to upon the evidence in the case.

Q. B. Div. 1899. OWENS *v.* THE QUEEN

The suppliant now moved for judgment pursuant to the leave so reserved.

The Rt. Hon. The Macdermot, Q.C., Ronan, Q.C., Campbell, Q.C., and *Collins*, for the suppliant.

The Attorney-General (*The Right Hon. John Atkinson, Q.C.*), *Wright, Q.C., Bourke, Q.C., Henry, Q.C.*, and *Morphy*, for the Crown.

Cur. adv. vult.

NOV. 29.

SIR P. O'BRIEN, L.C.J.:—

Mr. Owens, a National School teacher, the suppliant in this matter, seeks a declaration that certain Rules, purporting to be made by the Lord Lieutenant, with the consent of the Treasury, in pursuance of the powers vested in them by the National School Teachers Act, 1879 (42 & 43 Vict. c. 74) are *ultra vires*, and made without and in excess of jurisdiction, and that accordingly they are not binding upon him.

The facts upon which the suppliant bases his claim for the relief he seeks may be shortly stated. They are as follows:— In 1879 the National School Teachers Act, which provided for the superannuation and retirement of National School teachers was passed; and subsequently to that date, namely, on the 15th June, 1880, Mr. Browning wrote from the National School Teachers Superannuation Office to Mr. Owens. It is not requisite to set out the whole letter; it suffices to set out so

Q. B. Div. 1899.

OWENS v. THE QUEEN.

Sir P. O'Brien, L.C.J.

much of it as is necessary to show what the controversy is. He said:—

"SIR,—I am now in a position to acquaint you that you will be entitled to secure the full benefits of the National School Teachers Pension Act (42 & 43 Vict. c. 74), by submitting to a quarterly stoppage from your salary, so long as you shall be aged less than 65 years, of 9*s*. 9*d*. This will entitle you to pension privileges of the First Class First Division, viz. a pension from the age of 65 of £88 a-year, with the right to retire at any time after completing the age of 55, on reduced rates of pension, rising from £34 a-year."

To this letter Mr. Owens replied on the 16th June, 1880, and said:—

"SIR,—I request to be brought into the Pension System under Act 42 & 43 Vict. c. 74; and I elect to be subject to a quarterly stoppage of 9*s*. 9*d*., securing a pension of the First Class First Division."

This was the reply of Mr. Owens. Subsequently a formal document embodying the terms of his election to come into the pension system under the 42 & 43 Vict. c. 74, was signed by Mr. Owens and sent to the Treasury, and it has since been kept by that department. Mr. Owens submitted for some years to the prescribed stoppage of 9*s*. 9*d*. a quarter, and has always been willing to submit to a stoppage of that amount. Mr. Owens apparently thought that his position under the pension system had been stereotyped by what had taken place, that as long as he fulfilled the obligation of submitting to a quarterly stoppage from his salary of 9*s*. 9*d*., a pension of £88 on retirement at the age of sixty-five was secured to him. But he has sustained a very rude shock, because on the 15th December, 1897, he is told by the same department which had assured him that a quarterly stoppage of 9*s*. 9*d*. would be adequate to secure him a pension of £88, that, in order to secure the self-same pension of £88 he must for the future submit not merely to a quarterly stoppage of 9*s*. 9*d*., but to a quarterly stoppage of nearly double the amount, a quarterly stoppage of 17*s*. 11*d*. This, of course, was a very great surprise to Mr. Owens.

The Commissioners of the Treasury, by their officer, Mr. Browning, informed Mr. Owens that new Rules had been passed on the 22nd November, 1897, by which it was provided that for

the future 17*s.* 11*d.* should be permitted to be stopped quarterly as a condition of getting the annual pension of £88. Mr. Owens was asked, in the circular of the 15th December, 1897, would he comply with the requirements of the new Rules. A form of reply, to be filled in by him, was enclosed with this circular; but this he returned, stating that he "elected to pay the premiums" he "had contracted for."

On the 15th February he received a Minute from the Teachers Pension Office, asking whether he declined to elect to qualify for a pension of the 1st Class, and warning him that unless he *elected* to pay the premium under the new Rules of 1st Class he must be taken as having selected a lower Class.

Mr. Owens replied in a letter of the 16th February, 1898, in which he said:—

"Your minute gives me to understand that in order to retain those pension rights which I contracted for eighteen years ago, I *must* elect to pay henceforward the increased premium under the new Rules. I beg to state, therefore, that, acting under compulsion, I elect to pay this increased premium, retaining to myself the right to dispute a claim which, according to the highest opinion, is illegal, and for which, even if it be legal, I do not see the necessity."

This is the last letter to which I shall refer. It raises the question at issue in clear relief. Were the new rules under which this claim for an increased quarterly stoppage of 17*s.* 11*d.* was made, authorised by the Act of Parliament—the 42 & 43 Vict. c. 74? This is the net question; and, after very careful consideration of the case, and some fluctuation of opinion, I think the question must be answered in the affirmative; and that accordingly Mr. Owens is not entitled to the declaration he seeks.

The ground of my opinion may be shortly stated. There was no undertaking by any person or department that Mr. Owens should be absolutely and in any event paid by some person or department a pension of £88 a-year. What was conveyed and stated to Mr. Owens was that if he elected to come into the pension system under the 42 & 43 Vict. c. 74, he would, if he submitted to a quarterly stoppage of 9*s.* 9*d.*, be entitled on retirement to a pension of £88 a-year—that is to say, he would get his pension out of the fund provided by the Act of 1879, and subject to the

Q. B. Div. 1899. OWENS v. THE QUEEN. Sir P. O'Brien, L.C.J.

provisions of that statute; that, in fact, he would get his pension out of a fund which was administered under Rules, under an Act of Parliament expressly providing for the administration of that fund, not only by a set of Rules existing when the Act was passed, but by a set of Rules capable of coming into existence after the Act was passed.

The section of the Act which really governs this case is the 11th section. It seems to me, as I said more than once during the argument, that this whole case depends upon the construction we place upon that section, which is in these words:—

"The schedule to this Act shall be construed, and have effect as part of the Act. The Rules in the schedule to this Act may from time to time be *revoked, varied,* and *added to* by the Lord Lieutenant, with the consent of the Treasury."

The original Rules, under which the sum of 9*s.* 9*d.* was fixed as the adequate stoppage, have been revoked by the new Rules, and the increased stoppage of 17*s.* 11*d.* has been fixed under the new Rules.

The circumstances under which these new Rules came to be made is set forth in the Answer of the Attorney-General, and it is very necessary to revert to these circumstances. The Answer states that since the making of certain Rules of 11th December, 1885 (to which I shall refer hereafter), it has been found that the calculations made in the year 1879, and in 1885, were respectively founded on mistake and error, and that the pension fund will not be sufficient or adequate to satisfy the claims which in due course will come upon it; that on or about the 31st December, 1895, a deficiency of assets of about £1,200,000 was discovered, the capitalised value of the liabilities amounting to about £3,000,000, and the assets, on the basis of the Rules of 11th December, 1885, amounted to about £1,800,000. The Answer of the Attorney-General goes on to allege that unless the pension fund is supplemented by increased contributions from the salaries of teachers availing themselves of the Act, it cannot discharge the claims which will come upon it: and either the pensions to be paid to the teachers must be reduced, or the contributions from the salaries

of the teachers must be increased, in order that the fund may be solvent.

It is quite plain then that the necessity for the new Rules sprang from the impossibility of making the pension fund applicable to all claimants for whose benefit it was established, namely, not alone for teachers existing at the time of the passing of the Pensions Act, but for future teachers. The object of the statute would be defeated, and there would be, in my opinion, a maladministration of the fund if the position of things under the Rules of 1879 was rigid and stereotyped.

Now comes the great question, Was there power in His Excellency the Lord Lieutenant, with the consent of the Treasury, under the authority of the 11th section of the Act which I have quoted, to make Rules under which the situation might be recast and made conformable to the intention of the Legislature? I think this power was conferred by the 11th section of the Act.

That such a power does exist is, I think, sufficiently plain from a consideration of the scope and purview of the Act, and from the language of the 11th section itself. The statute provided for the superannuation and compulsory retirement of National School teachers, for the creation and administration of a pension fund in relation to a very numerous and very important body. This was all new—it had not been before attempted. A pension system in relation to National School teachers was hitherto unknown—there was no beaten path—no well-worn road along which all might safely travel; and the great object of the Legislature must be assumed to have been that the system should work in such way as to make it available for all persons who the Legislature contemplated should be brought into privity with it. It is not denied that the pension fund contemplated by the Act of Parliament was for the benefit of all teachers—present and future.

Bearing all these matters in mind, it is only reasonable to suppose that the system contemplated by the Legislature should be sufficiently elastic and malleable so as not only to provide for future contingencies, but to rectify what was defective and mistaken in the past. In the present case it would, I think, be an obvious mistake to make that, which was intended for all,

Q. B. Div. 1899.

Owens v. The Queen.

Sir P. O'Brien, L.C.J.

available only for some. A system which would most adequately secure the rights of all that were intended to come under it, should be, as I said, an elastic and malleable one which would not only provide for the present situation, but which could modify it.

This is what one would *a priori* expect, and it is, in my opinion, what is provided by the 11th section of the statute. The section not only provides for the variation of the original Schedule Rules and for addition to them, but enables the Lord Lieutenant, with the prescribed consent, from time to time to *revoke* them altogether, and this without any express qualification. There are no such words as "without prejudice to existing rights"; and I think the whole scope, purview, and object of the Act of Parliament forbids their implication.

There is a provision in the 6th section of the Act which is not without significance on the point we are discussing. That section provides amongst other things that if any question arises as to the claim of any person or class of persons for a pension or gratuity under the Act it shall be referred to the Treasury, whose decision shall be final. Now, while this section does not, in my opinion, operate so as to deprive us of the power of entertaining and deciding the questions submitted to us for decision on the present Petition, it nevertheless makes manifest that the Legislature was desirous to confer, and did confer, a very wide authority upon the Treasury. It would appear to me that—as the Treasury had an exclusive and unrestricted power to decide upon all claims to pensions—the Lord Lieutenant, with the consent of the Treasury, was to have a like power as to the rules which were to regulate the right to pensions. Indeed I think that the result which would attend a decision in favour of the suppliant would in itself afford a strong argument against the correctness of such a decision. It would involve this, that certain stereotyped rights had been created which necessitated that the pension fund should be applied so as to subserve those rights alone, so that, in effect, the fund would be made available for some teachers exclusively, whilst others, however meritorious, could have no claim upon it. This would, in my opinion, be in direct opposition to the scope and object of the Act of Parliament.

For these reasons I am of opinion that the suppliant is not entitled to the relief he seeks, and that accordingly his petition should be dismissed.

It will be perceived that I have not based my judgment on the Rules of 1885, or on what took place under these Rules. I have not done so because I am not satisfied there was any action of the suppliant under those Rules which would estop him from making the present claim. I rest my decision upon what I consider the true construction of the 11th section of the National School Teachers Act of 1879, bearing in mind the whole scope, policy, and purview of that statute.

JOHNSON, J.:—

In 1879, Patrick Owens the suppliant was, and is still, a National School teacher, 1st Class, 1st Division, under the Commissioners of National Education, Ireland. Previous to the passing of the Act of 1879 (42 & 43 Vict. c. 74) the retirement of National School teachers in Ireland at a definite age was not compulsory, nor was there any statutory provision for their superannuation; but it was the system of the Commissioners of National Education in Ireland, out of the public funds supplied to them, to grant to teachers, retiring from age or infirmity, gratuities computed on the basis of one year's salary for every ten years' service; and this, I take it, is the system referred to in the Act of 1879, Rule 5, as "the system in force at the time of the passing of the Act."

In this state of things Parliament deemed it expedient to make provision for the superannuation of the teachers of National Schools in Ireland, and, with that object, by the Act of 1879, established a "Pension Fund" for the purposes of the Act, consisting (sect. 3) of a Parliamentary Fund of £1,300,000, to be supplemented (sect. 4) by quarterly deductions from the salaries of classed teachers according to the scale in the Schedule Rules to the Act, subject to the alterations provided by sect. 11. Parliament considered that such fund would be adequate for its purposes, and would, when invested as provided by sect. 5, yield an annual sum sufficient to defray the pensions of all teachers to whom the Act applied, as their respective rights to superannuation should

Q. B. Div. 1899.

OWENS v. THE QUEEN.

Johnson, J.

arise. The Act (sect. 9) also made retirement of male teachers at sixty-five, of female teachers at sixty years of age compulsory, subject to a power to the Commissioners of National Education exceptionally to permit more extended service. By the Schedule Rule 5, teachers in the service when the Act passed were given the option of taking the benefit of the Act or retaining such right to gratuity as they previously had under the system theretofore in force; and, according to the Schedule of Rules, teachers in the suppliant's position were entitled on retirement to a pension of £88 a-year, and subjected to a contribution to "the Pension Fund" of 9*s*. 9*d*., deducted quarterly from their salaries.

The suppliant signed an official form, supplied to him for the purpose, electing to come in under the Act, and returned it stamped to the Lords Commissioners of the Treasury who have retained it. Thenceforth, until 1885, 9*s*. 9*d*. was deducted quarterly from his salary towards the "Pension Fund."

Actuarial calculations were subsequently made for the Irish Government from which, as I collect, it appeared that the quarterly deductions from the teachers' salaries, according to the Schedule Rules, were in excess of the requirements of the Act; and then the Lord Lieutenant, with the consent of the Treasury, under sect. 11 of the Act, made and promulgated new Rules, dated the 11th December, 1885, in substitution for the Rules scheduled to the Act (amongst other things), reducing the amount of the quarterly deductions from teachers' salaries, and, so far as regards the suppliant and teachers in the same position, reducing the quarterly deduction from 9*s*. 9*d*. to 8*s*. 9*d*., at which latter rate the quarterly deductions from the suppliant's salary continued until 1897, when the Irish Government caused further calculations to be made, from which, as I understand, it appeared that the former calculations were erroneous, and that "the Pension Fund" was then deficient by more than a million, to defray the claims of teachers who would come on it under the Act which established it; and the only mode provided by the Act of 1879 for meeting this deficiency, and rendering "the Pension Fund" solvent, for the purposes for which Parliament created it is, in the judgment of the Lord Lieutenant and the Treasury, by increasing the teachers' contribution to it by increased quarterly deductions from their salaries.

Accordingly, the Lord Lieutenant again, with the consent of the Treasury, under sect. 11 of the Act, made and promulgated new Rules, dated 22nd November, 1897, in substitution for the former Rules, raising the amount of the quarterly deductions in the case of the suppliant, and others in a similar position, to an amount considerably in excess of the original rate of 9*s.* 9*d.* Notwithstanding the suppliant's protest, this increased quarterly deduction has, against his consent, been made since 1897, from his salary as his contribution to "the Pension Fund."

In these circumstances two questions have been argued, and arise for decision:—1. Is the suppliant entitled to seek redress by Petition of Right; and, 2, Are the Rules of 1897 *intra* or *ultra vires*?

As to the first question, if the claim of the suppliant is well founded, moneys, part of his salary earned by him and due to him, have against his will, and notwithstanding his protest, been withheld from him by, and are now in hands of, the Crown, by the Lords Commissioners of the Treasury, one of the great Departments of State, and are, as the suppliant contends, moneys in the hands of the Treasury to his use; and this course the Treasury justify, and insist on continuing, under the Rules of 1897. For the recovery of these moneys, if he is entitled to them, and for the assertion of his right to relief, I think the authorities, which are conveniently collected in the Encyclopædia of the Laws of England, vol. 10, Title, "Petition of Right," establish that Petition of Right is the suppliant's appropriate remedy.

As to the argument for the Crown, founded on the terms of the prayer of the Petition, I think the Petition of Right Act, 23 & 24 Vict. c. 34, s. 7 (extended to Ireland by the 36 & 37 Vict. c. 69) contemplates, in the absence of rules to the contrary, the application of the existing practice to Petitions of Right; and that, under the *Fiat*, "Let Right be done," this Court, if it has all the materials (as in this case I think it has) necessary for finally determining the real question in dispute between the suppliant and the Crown, ought to give judgment accordingly. I do not, however, think it necessary to discuss this part of the case further, because, for the reasons I shall state, I think, the suppliant's claim is not well founded.

Q. B. Div. 1899.

OWENS v. THE QUEEN.

Johnson, J.

The second and principal question for decision is whether the Rules of 1897 are *intra* or *ultra vires*. The argument for the suppliant, as I understand it, is that a compact (unalterable except by mutual consent) was entered into between the Lords Commissioners of the Treasury and the suppliant in 1880, on his electing to abandon all right to gratuity under the former system, and to accept the Act and Schedule of 1879; and that, by this compact, no sum in excess of 9*s.* 9*d.* per quarter was (except by mutual consent) to be deducted from his salary as his contribution to "the Pension Fund," securing to him a pension of £88 a year for his life on his compulsory retirement at 65 years of age; that by mutual consent this compact was varied in 1885–6 by substituting 8*s.* 9*d.* for 9*s.* 9*d.* so long as both parties agreed to it; but that he has not consented to, and, on the contrary, has protested against, any quarterly deduction, in excess of 9*s.* 9*d.* from his salary, as provided by the Rules of 1897, which, as he contends, even if they are valid as to teachers coming under the Act after the Rules of 1897 were promulgated, cannot be retrospectively operative as to teachers in the suppliant's position, and are therefore *ultra vires*, so far, at all events, as the suppliant and all teachers similarly circumstanced are concerned, and do not warrant the position taken up by the Crown that a greater sum than 9*s.* 9*d.* per quarter, according to the Schedule to the Act, can lawfully be deducted from the suppliant's salary against his protest and without his consent.

As matter of fact the Pension Fund is now insolvent for payment of pensions of the scale provided by the Act and Schedule of 1879; and, if the Rules of 1897 have not retrospective operation, little or no Pension Fund will remain for teachers coming under the Act after the promulgation of those Rules. But I find no evidence of this alleged contract between the Treasury and the suppliant. The right of the suppliant is derived not from contract with the Treasury but directly from the Statute and Schedule of 1879, subject to the provisions of—(*a*) sect. 10, which authorized the Treasury, with the consent of the Lord Lieutenant from time to time to make rules (to be laid before Parliament) for the administration of the Act; and (*b*) sect. 11, which, while it provides that the Schedule shall be construed and have effect as part

of the Act, also enacts that "the Rules in the Schedule may from time to time be revoked, varied, and added to by the Lord Lieutenant with the consent of the Treasury."

When the suppliant elected to take with the Act and Schedule, he did so subject to the provisions of section 11.

No arbitrary limit was fixed by the Act to the amount of the Pension Fund, which was left to depend on the amount required for the demands for which Parliament established it for the purposes of the Act. Parliament made a grant to the fund of a fixed sum of £1,300,000, and left such amount as, beyond that sum, should be necessary for the purposes of "the Pension Fund" to be supplied by contributions by quarterly deductions from teachers' salaries. The fund was established in contemplation of the superannuation not only of the then national school classed teachers, but also of all classed national school teachers who should come within the provisions of the Act. This cannot be effected unless "the Pension Fund" is maintained at a level sufficient for all its purposes; and, inasmuch as the amount granted by Parliament is a fixed sum, if at any time "the Pension Fund" proves excessive, or deficient, as the case may be, for its purposes, which it is for the Lord Lieutenant and Treasury to ascertain and determine, the only mode provided by Parliament, for adjusting the amount of teachers' contributions to supplement the Parliamentary grant to the required extent, would appear to be the provision under section 11, by new Rules from time to time reducing or increasing as occasion may require the contributions by the teachers' salaries.

By entrusting this extensive power to the Lord Lieutenant, the Highest officer of State in Ireland, with the consent (which imports approval) of the Treasury, Parliament considered it had effectually secured that just and due regard would be had to every interest affected by its exercise; and the question is, I think, narrowed to what is the true construction of section 11.

This section appears, in effect, to have been based on, if not borrowed from, the provisions of the Building Societies Acts, to which Mr. Justice Gibson drew attention early in the argument. These societies are incorporated under Rules approved by the Registrar of Friendly Societies for the government of the society;

Q. B. Div. 1899.

OWENS v. THE QUEEN.

Johnson, J.

and the Building Society Act, 1874 (37 & 38 Vict, c. 42), s. 18, empowers these societies to "*alter or rescind* any rule or make any additional rule in the manner its rules direct." Several decisions have established, though not exhaustively, the extent to which this power authorises new rules from time to time for the adjustment and management of the internal affairs of the society as distinguished from claims of external creditors.

In *Pepe* v. *City and Suburban Building Society* (1), Chitty, J., decided that the vested right to immediate payment of a member holding fully paid up £50 shares was, by a new rule made in the required manner, and operating retrospectively, divested, by empowering the directors of the society to pay in priority any member holding less than £50 in the society.

In *Strohmenger* v. *Finsbury Building Society* (2), owing to defalcations of some of its officials, the funds of the society were insufficient to pay its members in full under the existing rules, and the Court of Appeal held that a new rule, made in the required manner, and operating retrospectively, by which each member's share was reduced to $\frac{33}{50}$ths of its full amount was *intra vires*.

In the recent *Sixth West Kent Building Society* v. *Hills* (3), the assets of the society were insufficient to pay its members in full under the existing rules; and Byrne, J., held a new rule, made in the required manner, to be *intra vires*, by which the directors, in order to realise the assets of the society, were empowered to sell the property of the society in all or part to any member or members, and to accept in payment any fully paid-up shares of the purchasing member or members, whether under notice of withdrawal or not.

In all these cases the relation of contract existed between the society and its members, and *Auld's Case* (4), in the House of Lords was relied on (but not successfully) against the validity of the new rule. But in *Auld's Case* (4), instead of proceeding by a new rule made in the prescribed manner, a majority of the society, leaving the existing rules unaltered, passed a resolution incon-

(1) [1893] 2 Ch. 311.
(2) [1897] 2 Ch. 469.
(3) [1899] 2 Ch. 60.
(4) 12 App. Cas. 147.

sistent with the existing rules, and sought to impose it on the minority, who had never contracted to be so bound. This is pointed out in the judgments in that case, especially by Lord Macnaghten, who says (1) :—

"In societies of this sort (a building society) the rules form the contract between the members and the society, and that contract can only be altered in the mode prescribed by Act of Parliament. In this case the respondents have attempted to alter the contract in a manner which appears to me not to be justified or authorised by anything in the Act."

But, in the present case, no contractual right is involved; the suppliant's right is statutory, given by the Statute of 1879 (which created "the Pension Fund"), and by its Schedule Rules, headed "*Regulations as to Payment of Premiums, &c.*, 1, *Payment of Premiums.*" These same Schedule Rules are by the same statute subjected to rescission, alteration, and addition from time to time as provided by section 11; and, when the suppliant gave up his right to gratuity, and took with the Act and Schedule of 1879, he did so subject to such rescission and alteration of, or addition to, the Schedule Rules as section 11 provided. The Rules of 1879 are made in the manner prescribed by the Act of Parliament, and, however hardly this may bear on the suppliant and those in like cases, I am unable in the existing state of the law to come to any other conclusion than that the Rules of 1897 are *intra vires*, and that judgment ought to be given for the Crown.

MURPHY, J. :—

I concur. I consider it almost unnecessary to add anything to what has been said by the Lord Chief Justice and Mr. Justice Johnson. In my opinion, the question in this case arises under the statute of 1879, and must be settled upon a consideration of the provisions to be found in that statute, and in that statute alone.

The National School Teachers (Ireland) Act, 1879 (42 & 43 Vict. c. 74), was passed to provide a pension fund for National School teachers in Ireland. The first five sections of the Act

(1) 12 App. Cas. p. 205.

Q. B. Div. 1899.

OWENS v. THE QUEEN.

Murphy, J.

provide for the mode in which the fund is to be created. Section 6 is in these terms:—

"It shall be lawful for the Lord Lieutenant, with the consent of the Treasury, to grant to any classed teacher of a National School in Ireland, on his retirement from the service, a pension or gratuity according to the scale, and subject to the provisions, contained in the schedule to this Act, chargeable upon the pension fund, and to be paid in the prescribed manner."

From this section it is manifest that the Legislature intended to leave the complete control of this fund to the Lord Lieutenant and the Treasury; that all questions in regard to pensions or gratuities granted to any person or class of persons under the Act should be referred to the Treasury; and that their decision thereon should be final. It seems to me that, to anyone reading that section, it would be perfectly clear that the framers of the Act never intended that persons should apply to any other body, or to any other tribunal than the Treasury, in whom is placed full power as to the distribution of the fund created for the purpose of paying these pensions.

In the Schedule annexed to the Act—which (by section 11) is declared to have the same effect as if it were part of the Act—are set out the pensions to which it was then considered such teachers would be entitled under the Rules stated in the Schedule; and, by section 11, it is provided that:—

"The Rules in the Schedule to this Act may from time to time be revoked, varied, and added to, by the Lord Lieutenant with the consent of the Treasury."

This provision seems to have been introduced because it was foreseen that circumstances might thereafter arise which might render the Rules, as they originally stood, unfair to many, or incapable of being administered with a proper regard to the claims of the various persons for whose benefit the Act was passed. It was perfectly manifest even at that time that the necessity for reviewing the Rules would arise. The circumstances that led to the preparation of a different scheme in 1885 are referred to in some of the documents before us.

In 1885, the Treasury considered that the fund would be

sufficient to confer on the teachers (and amongst them on the suppliant) greater benefits than were secured to them by the Rules then in force; and, in this belief, new Rules were made, under the provisions of sect. 11. These Rules continued in force from 1885 until November, 1897.

In November, 1897, it appears that it was discovered that the Rules of 1879 and of 1885 were founded on mistake or error, and that the funds would not be at all sufficient to meet the claims that would arise; and, being satisfied of this, the Treasury caused new Rules (under sect. 11) to be framed, which have been in force since January, 1898. The petitioner, finding that he will not be in so good a position under these Rules as he was under those of 1885, now asks this Court to declare that the Rules of 1897 are *ultra vires*.

In my opinion this Court has no power whatever to make any such declaration. The Act gives no power to the Court to interfere in any way in the framing of Rules for the administration of this fund; and it is hard to see how such a matter could be put under the guidance of this Court. Full and complete power is given to the Lord Lieutenant, with the consent of the Treasury, "to revoke, vary, and add to" the Rules from time to time, and it is obvious that powers of such a nature should be entrusted to some public board or body of persons, with the object of carrying the purposes of the Act into execution. Here that power has been conferred on a high department of the State; and I fail to understand how it can be urged (as is done in paragraph 8 of the petition) that the documents in evidence "form a valid and binding contract between the Lords Commissioners of the Treasury and the suppliant, and that no material alteration in the terms thereof can be made without the consent of both the contracting parties." I cannot understand how such a proposition ever arose to the mind of any lawyer. If that contention were to be accepted, it would nullify the effect of sect. 11 of the Act, with the result that within a few years the fund might be completely exhausted, and nothing left out of which any further pensions could be discharged. I cannot see how the petition can possibly be sustained. It is only necessary, in my opinion, to read, from the answer and plea, the explanation how the question has arisen, and to look at

Q. B. Div. 1899.

OWENS v. THE QUEEN.

sections 6 and 11 of the Act in order to see that the suppliant must fail.

GIBSON, J.:—

The petitioner, who was a principal teacher of the First Class, First Division, and had no statutory or other right to pension when the Act of 1879 was passed, elected to join the Pension Scheme offered by that Act, and paid the annual premium (by way of stoppage from his salary) of 9*s.* 9*d.* per quarter, necessary to secure pension privileges of the First Class. The Schedule regulations were then in force. In 1885, it being supposed that there was a surplus of assets over existing liabilities, the Schedule regulations were revoked and replaced by new Rules, the benefit of which the petitioner elected to take; and he afterwards, under such Rules, paid the reduced premium of 8*s.* 9*d.* The effect of these new Rules was to increase the liabilities affecting the Pension Fund. In 1896 it was discovered that the fund was insufficient to meet the claims upon it, the excess of liabilities over assets appearing to be about £1,200,000. The insolvency of the fund is attributed to various causes—the original inadequacy of the endowment and of the scale of premiums, the alteration of circumstances, such as unexpectedly rapid promotion of teachers resulting in enhanced demands on the fund, the changes made in 1885, and the fall in the rate of interest on investments. It is not disputed on behalf of the petitioner that the fund is insolvent and unable to meet all pension claims in full; and it is conceded by the Attorney-General that the fund is sufficient to pay the pension of the petitioner and teachers similarly circumstanced at the original rate of premium, if they are entitled to priority and free from the operation of subsequent Rules. Supposing, however, that the petitioner's rights now depend on the Rules of 1885, it would seem that the fund would be insufficient to discharge all claims accruing under those Rules. If the view now presented on behalf of the Crown is correct, that the rate of premium and pension might be varied from time to time under section 11, it is to be regretted that attention was not called in the official circulars to the possibility of change. The Attorney-General, however, contends that this was a risk patent on the face of the statute, and

that the petitioner having paid an inadequate premium for many years is not entitled to have that premium stereotyped, with the result that the insolvency of what was intended to be a permanent Pension Fund for all present and future teachers will be assured and accelerated.

On the threshold of the inquiry we are met by the question of jurisdiction. If the Court decides that it has no jurisdiction, it ought not to express any extra-judicial opinion upon the effect of sect. 11 or any of the other points discussed in argument. No doubt if the question of jurisdiction was doubtful and the Court was satisfied that the petitioner's claim was unsustainable, the Court, without deciding as to jurisdiction, might dismiss the case on the merits. This course, which was adopted in *Reg.* (*Coghlan*) v. *Inspectors of Fisheries*, (1) is, however exceptional; and, as the point has been fully argued, I feel bound to decide it.

Petitioner's counsel objected that it was not open on the pleadings; but the Court over-ruled that contention. The defence raises the question that the petition is demurrable. Even if the defence raised no such issue, the Court itself, dealing with a general statute, would be compelled to take notice of want of jurisdiction. The parties could not by consent, and still less could one of them by an omission in pleading, impose on the Court, in a case like the present, the duty of giving judgment which to its own knowlege it had no jurisdiction to pronounce. The very statute on which the petitioner's claim is based is that which (it is urged) shows the absence of jurisdiction. The Act is a general one of which the Court must take cognizance, and the facts are quite different from a case where the want of jurisdiction depends on a matter which must be brought to the notice of the Court by an express plea.

Whether there is jurisdiction or not depends on the construction of the second clause of sect. 6 of the Act. Assuming for the purpose of this preliminary point that the Rules of 1897 do not bind the petitioner, and that, in breach of his statutory right, he has been compelled to submit to illegal deductions, does sect. 6 deprive him of redress in this Court? That section deals with the

(1) [1896] 2 I. R. p. 60.

Q. B. Div. 1899.

OWENS v. THE QUEEN.

Gibson, J.

granting of pensions and gratuities on retirement; and, where any question arises as to the claim of any person or class of persons for a pension or gratuity under the Act, such claim is (by clause 2) to be referred to the Treasury, whose decision is to be final. This provision appears to relate to questions arising on the ultimate award upon retirement, and not to anterior questions relating to the legality of deductions. Under the Schedule Rules (*e.g.* Rules 17 and 19), a teacher whose claims to pension have ceased may be entitled to have his premiums refunded. What is there to vest in the Treasury the cognizance of a dispute in such a case? Clear words are necessary to exclude the jurisdiction of our Courts; and, whatever may be the effect of sect. 6 in cases to which it applies, I must hold that, if the petitioner is aggrieved by illegal stoppages, he is not deprived of the right of appealing to the law for relief.

The main question in the case is whether the petitioner is bound by the Rules of 1897. He contends that they are *ultra vires* as to him, as he entered under different Rules which conferred upon him vested rights indefeasible without his consent.

The Act is framed in a way which might mislead. Section 4 appears at first sight to direct the deductions to be made permanently, in accordance with the provisions of the schedule; and the circumstance that the Rules are set out in a Schedule forming part of the Act itself might naturally convey the impression that they were unalterable and final. When, however, section 11 is read, it is plain that, subject to the provisions of section 9 as to age, an absolute and uncontrolled power is thereby given of superseding the statutory Schedule in whole or in part, and replacing it by new Rules as to premiums and pensions. This is not questioned by petitioner's counsel; but they contend that the powers given by section 11 are only exercisable subject and without prejudice to the petitioner's vested rights as a subscriber under the Schedule; and that such rights, founded on a statutory bargain, cannot be affected without his consent. The point in controversy therefore is, whether the rights of a subscriber are indefeasible or not.

The statute must be read and interpreted as a whole. It creates new rights. The petitioner's claim is entirely based on it,

and not on any antecedent title. The object was to establish a permanent pension fund; and, in the interest of the entire body of teachers, it would seem essential that the scale of premiums and pension should be capable of modification, by way of increase or diminution as the circumstances of the fund should require. The Schedule must therefore be read as if prefaced by a reference to the overriding control of section 11. The administrative Rules referred to in section 10 are of a different character from those dealt with by section 11 and the Schedule. They are "prescribed" under section 2, and they relate to the "prescribed manner" mentioned in sections 4 and 6. They are not before the Court in any way. Mr. Campbell mentioned them for the first time in his reply, and he relied upon the provision in section 10, requiring these Rules to be laid before Parliament, as showing that section 11, which gives no similar protection, should be strictly construed.

The argument was mainly based on the supposed application of the principle that, in the absence of clear words, the Legislature is not presumed to intend retrospectively to affect existing rights. No case, however, was cited where the principle was applied to a statute which creates rights, and at the same time contains a power of revocation. The question here is, had each subscriber an indefeasible right under the Pension Rules in force at the time of his joining the scheme?

An example of somewhat analogous legislation is afforded by the Building Society code. Members under rules duly certified under those Acts have quasi-contractual rights which they might claim to be indefeasible quite as fairly as teachers under the Pension Scheme. Yet in *Pepe* v. *City and Suburban Building Society* (1), where the member had actually given notice of withdrawal, Chitty, J., held that existing rights might be divested by new Rules. The terms of the rule authorising the alterations are not given; but a decision of Huddleston, B., and Stephen, J., in *Davies* v. *Chatham, &c., Building Society* (2), is mentioned with approval, where the particular rule there enabling the alteration is set out in the report in full. The Building Acts of 1874 and 1894 give express power of changing Rules. Under these enactments

(1) [1893] 2 Ch. 311. (2) 61 L. T. (N. S.) 680, 683.

Q. B. Div. 1899. OWENS v. THE QUEEN. Gibson, J.

it was decided by the Court of Appeal in *Strohmenger's Case* (1) that rules in defeasance of previous rights could be made. The limitations of the power, which could not extend to the constitution of the society or outside creditors, were explained by Chitty, L.J. (2).

The case was applied and followed in the case of *Sixth West Kent Mutual Building Society* v. *Hills* (3). The only protection given by those Acts, where rules authorising alterations of rights were *intra vires*, was that the consent of a three-fourths majority at a special meeting was necessary. Such a consent might obviously be influenced by adverse interests of the majority, and was a less satisfactory safeguard than is afforded by the statute of 1879, which vests the responsibility of altering Rules in the Lord Lieutenant and Treasury, who are entrusted with the discharge of a public duty or trust, and who are not open to any suspicion of selfish or indirect motive. It may be said that these authorities are distinguishable, as, in the present case, the Schedule is part of the statute. But the statutory schedule is just as capable of revision and modification as the Schedule Rules under the Judicature Act.

It was assumed as clear by petitioner's counsel that, if each set of Rules was regarded as a substantive statute, and a new set of Rules was in the nature of a repealing Statute, such repealing Statute must be read as implying a saving clause in favour of rights under the repealed Rules. This proposition is far from certain. An enactment, the subject of express repeal, is considered, except as to transactions past and closed, as if it had never been, and as completely wiped out. No doubt, where under a statute an estate has passed or a right has been extinguished, the repeal of that statute does not divest the estate or revive the right. But does the present case fall within that principle? If every repealing enactment is deemed to imply a saving clause in favour of all existing rights, why do we find express provisions preserving such rights in such statutes as the Statute Law Revision Acts and the Interpretation Act, section 38? Is such legislation superfluous and redundant? There are several cases decided on such pro-

(1) [1897] 2 Ch. 469. (2) [1897] 2 Ch. p. 480. (3) [1899] 2 Ch. 60.

visions which the Court seems to have thought essential to preserve rights from the effect of repeal.

Without reference to any assistance derived from the Building Society cases, I think that, on its true construction, section 11 bestows an unquestionable and unqualified authority to make Rules to secure the maintenance and preservation of the fund as one continuous entity. There is no provision that rights under previous Rules shall be deemed to subsist notwithstanding the revocation of those Rules. No such restriction can be implied. The 6th section, which vests in the Treasury the final decision of pension claims, seems inconsistent with the notion that the petitioner has indefeasible rights. Other provisions, such as Rule 18 in the Schedule, point in the same direction. Suppose that the petitioner had joined and quitted the service in 1886 when the favourable premiums under the Rules of 1885 were in force, and saw fit to rejoin it in 1898, could he then claim, under Rule 18, to be entitled to pension at his original unduly low rate of premium, to the prejudice of intervening subscribers under the rules of 1897, who would be paying high premiums and whose security would be affected by the suppliant having a preferential claim though only paying at the lower rate?

It may be suggested that section 9, which prescribes a compulsory age limit for retirement, favours the suppliant's view. It seems to me neutral so far as relates to the present controversy. It enacts a term which no Pension Rules could interfere with or alter. The evidence does not disclose what, before the Act, was the teachers' tenure or how they were dismissable, or whether they could have claimed to continue in office after 65 or any other age. Whatever were the terms of employment, they had no previous pension rights, and the Act of 1879 was largely founded on bounty. The interests of education obviously demanded an age limit. But how does section 9 restrict the operation of section 11, or show that each set of subscribers under the original Rules, the Rules of 1885, and 1897, respectively, had different rights varying according to priority of time? What is there to indicate that the pension fund was to be parcelled out between preferential and *puisne* incumbrancers? Was not the intention that all teachers should enjoy the same priority?

Q. B. Div. 1899.

OWENS v. THE QUEEN.

Gibson, J.

There is a further difficulty in the petitioner's way when he insists on a right to claim under the original Schedule. The Rules of 1885, where they apply, superseded the Schedule save so far as the latter was incorporated therewith. The petitioner has given in his adhesion to these Rules of 1885. How can he fall back on the superseded Rules, or question the regularity and legitimacy of the new Rules as a whole? Can he claim the benefit of the Schedule, and also at the same time the advantages given by the new Rules which replace it? The effect of the code of 1885 was to increase the liabilities and materially to affect the solvency of the pension fund. The alteration was based on a financial blunder. The suppliant seems to contend that, so far as he is concerned, the mistake must be treated as stereotyped for his benefit, and that it never can be corrected.

If sect. 11 enables Rules to be made which might vary or affect the suppliant's previous rights, the correspondence cannot aid his case. A contract not to exercise the statutory power or trust would be plainly *ultra vires* and void on the ground of public policy. Thus, in *Dunn* v. *Reg.* (1), a contract of employment for three years certain with a civil servant was held to be inoperative on the ground that there was no statute authorizing such a contract, and that the Crown, on the principle of public policy, was entitled to dismiss at will. No bargain could give the suppliant a priority, to which he was not entitled, at the expense of other subscribers. But, in the present case, in my opinion, the circulars and letters do not constitute a contract *inter partes* at all. The suppliant accepted an invitation to join the pension scheme; but the rights acquired by his election to become a subscriber depend, not on contract, but on the statute, which prescribes the nature, measure, and conditions of the privileges it confers.

The pension plan—intended for the benefit of present and future generations of teachers alike—was, in 1879, an experiment; and, for the success of that experiment, the reservation of powers of revision and control was essential. It would have been foredoomed to failure if at its birth it had been shut up into a strait waistcoat, not allowing adjustment or modification, which might

(1) [1895] 1 Q. B. 116.

become desirable to suit changed conditions. If the fund proved to be more productive than was anticipated, pensions might have been raised or premiums reduced. On the other hand, if the estimate was found to have been unduly sanguine, it might have been necessary to lower the pensions or augment the premiums. In the welfare and continuity of the fund all were interested. Supposing that the temporary prosperity of the fund justified an abatement of premiums, would the concession, if made, have been irrevocable so far as regarded then existing teachers? The nature of the fund, and the uncertain character of the liabilities and future contingencies affecting it, compelled Parliament to establish a superintending authority. The scheme was not to be of cast iron, but elastic. The safeguard for the permanence and security of the fund so supplied this Court cannot interfere with or discard.

The Attorney-General applied that costs should be awarded against the suppliant, citing the Petition of Right Act, 1860, sect. 11 (23 & 24 Vict. c. 34), which enacts that, upon any Petition of Right, the Attorney-General or other person appearing on behalf of Her Majesty "shall be entitled respectively to recover costs against the suppliant in the same manner and subject to the same restrictions and discretion, and under the same rules, regulations, and provisions, so far as they are applicable, as are or may be usually adopted or in force touching the payment or receipt of costs in proceedings between subject and subject." Any suggestion falling from the Court would, he said, be laid before the Treasury; but the Crown was entitled to be treated as if this were an action between subject and subject, and, having succeeded, was entitled to an order for the costs. The Treasury, as soon as this deficit was ascertained, had come forward at once, and contributed a large sum, £200,000. It was not unreasonable to ask the teachers to contribute also towards the preservation of a fund created for their benefit.

THE COURT suggested the propriety, under the circumstances, of not pressing the application; but the Attorney-General declined to yield, and asked for a formal order, "with costs."

Q. B. Div. 1899.

OWENS v. THE QUEEN.

The Right Hon. The Macdermot, Q. C. :—

This litigation has here arisen solely through the mistakes of Treasury officials, and the suppliant was directly invited by the Treasury to have the question of the validity of these Rules determined by the Court.

SIR P. O'BRIEN, L.C.J. :—

The majority of the Court think that the Attorney-General should get the costs. I am, unfortunately, of the contrary opinion. I think that he should not. I think that, from first to last, the conduct of Mr. Owens in this case has been perfectly *bona fide*. It seems to me that this litigation has all been brought about, not by Mr. Owens, but by public officers and actuarial mistakes, and that he should not now be visited with costs. While the judgment of the Court is that the petition be dismissed with costs, I must put on record my dissent from that view.

JOHNSON, J. :—

In consequence of what my Lord has said, I wish to say that this, as it appears to me, was a legal argument in the nature of a demurrer to the petition. It has been so discussed and decided; and, the decision of the Court being in favour of the Crown, judgment should, in my opinion, be entered for them, with costs. I say nothing whatever as to the suppliant having been led into this litigation; but I fully agree with my Lord that his conduct has been perfectly *bona fide* throughout.

MURPHY, J., concurred with the majority of the Court.

GIBSON, J. :—

I agree with my Lord and with Mr. Justice Johnson as to the *bona fides* of Owens throughout. He misinterpreted the Act of Parliament. But there was no surprise. All the facts upon which we have now determined the matter were known to Mr. Owens and his advisers; and I cannot see how this Court, in the exercise of any discretion, could, on the ground of sympathy, withhold costs from the Crown, where the decision against the defeated suppliant has gone upon the ground that he has no case. There

has been no misconduct; I can sympathize with the feeling which influences my Lord in his view; and I hope that the suggestion of the Court—that the order as to costs should not be executed—will be laid before the Treasury.

Solicitors for suppliant: *Casey & Clay.*
Solicitor for the Crown: *Sir P. Coll.*

A. E. R. J.

RYAN, TENANT; O'BRIEN, LANDLORD (1).

Appeal. 1900. April 25.

Landlord and tenant—Land Law (Ireland) Act, 1896, *sect.* 5, *sub-sect.* 2—*Character of holding—Mill—Separation of agricultural part from mill portion of premises.*

The holding comprised 113 acres, situate one mile from the town of Nenagh, and was held under a tenancy from year to year, created by parol, subject to the rent of £260 a year. The holding included a large flour mill, which, with the yard and offices attached to it, occupied about two acres. The mill had not been used for a number of years. There was a very good residence on the farm, which was completely separate from the mill portion, and had a separate approach from the county road. There was some evidence to show that the mill might be let separately from the agricultural portion of the holding:—

Held (reversing the decision of the Land Commission), that a distinct and substantive part of the property was not agricultural or pastoral, and that the separation of the property into two would not, apart from fixing a fair rent, diminish the value of the landlord's interest therein. The Court remitted the case to the Land Commission to make the separation.

THE holding comprised 113A. 3R. 33P., statute measure, situate about one mile from Nenagh, in the county Tipperary. The entire was held under a tenancy from year to year, at the rent of £260, and the Poor Law valuation was £215 10*s.* There was upon the premises a large flour mill, stated to have been built by

(1) Before LORD ASHBOURNE, C., and FITZGIBBON, WALKER, and HOLMES, L.JJ.

Appeal. 1900.

RYAN, *Tenant;* O'BRIEN, *Landlord.*

the tenant, which had not been used for a number of years. The mill, with a yard and offices, occupied about two acres, and the millrace flowed past the lands of three other tenants. There was a good house on the agricultural portion, coach-house, barn, stables, and out-offices, all outside the mill portion of the premises. There was a separate road and entrance from the county road to the dwelling-house, altogether distinct from the mill. The annual valuation upon the buildings was £60—£20 being assessed in respect of the dwelling-house and offices, and £40 in respect of the flour-mill.

In 1888 the tenant served an originating notice to have a fair rent fixed, and the application was dismissed on the 18th June, 1890, on the ground that the holding was not mainly agricultural or pastoral. The tenant served notice of appeal, which was dismissed by the Land Commission on the 25th March, 1892. After the passing of the Act of 1896 the tenant served a fresh originating notice, claiming that the holding should be divided under sect. 5, sub-sect. 2 of that Act.

On the cross-examination of the agent of the landlord it appeared there might be purposes for which the mill might be of use independently of the farm; that possibly it might be let for an electric lighting station, or a creamery, or a woollen mill. The Sub-Commission dismissed the originating notice, on the ground that the separation of the mill premises from the rest of the holding would seriously diminish the landlord's interest in the property. On a re-hearing before the Land Commission this decision was affirmed. The tenant appealed.

Healy, Q.C., and *C. Doyle*, for the appellant.

Matheson, Q.C., and *F. A. P. Hamilton*, for the respondent.

LORD ASHBOURNE, C.:—

This is an appeal from an order of the Land Commission, dated the 20th February, 1900, affirming an order of the Sub-Commission dismissing the tenant's application to have a fair rent fixed. The holding in question consists of a farm of 111A. 0R. 16P., upon a portion of which there is a large corn mill, which has not

been used for a number of years. It is held under an ordinary tenancy from year to year, and the tenant's application was to have a fair rent fixed on the entire holding, or in the alternative on such portion of it as was purely agricultural or pastoral, if the Court would separate the mill portion from the rest of the holding, in accordance with the provisions of sect. 5, sub-sect. 2 of the Land Law Act, 1896.

This appeal really turns on the application of sect. 5, sub-sect. 2 to the facts of this case. That sub-section requires a great many matters of fact to be proved to the satisfaction of the Court before that sub-section can be applied. But this process does not involve any question of law, but a question of fact only. The sub-section requires that the Court, which is asked to apply its provisions, shall in the first instance arrive at the conclusion that a distinct and substantive part of the holding is not agricultural or pastoral in its character, and that that part is not the substantial part of such property, and the Court must also be of opinion that apart from fixing a fair rent the separation of the property into two parts will not diminish the value of the landlord's interest therein, and then being satisfied of those facts the Court may direct that that part shall be treated as a separate holding. These are all questions of fact, and the Court must be satisfied upon all these topics before it can arrive at a conclusion in favour of separation.

It is true that this holding was examined by the Sub-Commission, who had the opportunity of seeing and inspecting the premises; it is also true that the Land Commission had the advantage of hearing the evidence in the case, and a considerable amount of oral evidence was given before them. But it is our duty in the Court of Appeal to apply our minds to the evidence which has been presented to us, and to the appearance presented by the locality from the maps which have been proved. We have had abundant opportunity of considering the locality and the position of this farm near Nenagh. The contention on behalf of the landlord is that this holding cannot be regarded as agricultural or pastoral, because a part of it is composed of valuable mill premises. The mill, together with a large mill yard, and mill offices, and a house, occupies about two acres; there is also the

Appeal. 1900. RYAN, *Tenant;* O'BRIEN, *Landlord.* Lord Ashbourne, C.

mill dam. That case is met by the tenant by acknowledging that to be so; but he contends that under sub-sect. 2 of sect. 5 that is not the substantial part of the property, and he contends that the separation of the farm into two parts will not diminish the value of the landlord's property in the holding. That is the way the contention stands, and after full consideration of the argument I arrive at the conclusion as a question of fact that this holding is capable of being divided into two separate holdings, without diminishing the value of the landlord's interest, apart from fixing a fair rent. The mill has a separate ingress and regress from the road adjoining, and it has no connection with the user of the rest of the farm, which is purely agricultural or pastoral in its character.

That being so, I am of opinion that the proper order for us to make will be a declaration that a distinct and substantive portion of the property is not agricultural or pastoral, and that a separation of the holding into two parts will not diminish the landlord's interest in the property, and with that declaration we shall send the case back to the Land Commission to carry out the separation. They can make the separation, and ear-mark the portion of the holding that is to be treated as a separate holding and apportion the rent between the two.

FITZ GIBBON, L. J. :—

As our order may be a precedent in admitting tenants to the benefit of the Land Acts through the Act of 1896, I shall read the terms in which we intend to make it :—

> "The Court is of opinion, and doth declare, upon the evidence, that a distinct and substantive part of the property which constitutes the holding is not agricultural or pastoral in its character, but consists of the lands, buildings, works, and water power, of or belonging to a mill, or used therewith, and doth declare that that part is not the substantial part of the property; and the Court is also of opinion, and doth further declare, that, apart from the fixing of the fair rent, the separation of the property into two parts will not diminish the value of the landlord's interest therein; and accordingly doth declare that the above-mentioned part shall henceforth be a separate holding; and doth remit the case to the Land Commission to proceed therein pursuant to the Land Law (Ireland) Act, 1896, as

to justice may appertain; the landlord to pay the costs of the appeal: the costs of both parties before the Land Commission to abide the order of the Land Commission."

Appeal. 1900.

RYAN, *Tenant;* O'BRIEN, *Landlord.*

Fitz Gibbon. L.J.

The words in sect. 5, sub-sect. 2, "apart from fixing a fair rent," exclude from consideration the change in the position of the landlord and the tenant, by the conversion of the tenure into a statutory tenancy: the exclusion is not confined to the mere alteration in the amount of the rent, which is assumed to be "fair." The question whether separation will diminish the value of the landlord's interest will be best considered on the assumption that the entire holding is in his hands for letting, and that the Land Acts do not apply to it. So long as this mill-building and water-power remain idle, they have no present value. Being on a holding the rest of which is agricultural or pastoral, this non-agricultural part represents a speculative expenditure by the tenant, which has become useless and unprofitable, and the best that can be done with it is to fence it off from the rest of the holding. Its only value is prospective, and contingent upon its being utilized at some future time. It is only by assuming that it is to be put to some use that we can deal with it as a factor of value to the landlord. Structurally, from the beginning, this mill and its appurtenances have been separate from the rest of the property, and have never derived any additional value from the remainder of the holding, nor *vice versa* has the farm derived any additional value from the mill. The only advantage common to both was in the fact that, while the mill was working, the miller-farmer, or farmer-miller, who worked both concerns, had a good house in which he lived. If the place was now on the landlord's hands for letting, I think that, if he could not (and experience shows that he cannot) find a tenant ready to work both the farm and the mill, he would try to find a good farmer as his tenant, and would say to him, as to the mill—"Do what you like with it, find a sub-tenant for it, make a creamery of it, get some one to work the water-power; or, if you prefer it, take the farm only, and I will keep the mill, and try to make something of it; but as it is useless at present, of course I cannot take anything off the rent of the farm, if you leave it on my hands." The house on the

Appeal. 1900.

RYAN, *Tenant;* O'BRIEN, *Landlord.*

Fitz Gibbon, L.J.

agricultural portion is a proper house for the farm. The best prospect of profit lies in using and letting the farm and the mill separately. I therefore find, as a matter of fact, that the value of the landlord's interest in the property is not diminished by separating the mill from the farm. The tenancy in the mill will continue until determined. The landlord can determine it whenever the terms of the tenancy so permit, if he sees his way to getting a larger rent for the mill from a separate tenant. The Land Commission must be assumed to be able and willing to apportion upon the mill an adequate, but not an excessive, proportion of the existing rent, so as not to make it the pecuniary interest of the tenant to put an end to the existing tenancy. In *Norton's Case* (1), we held that a holding ought not to be cut into two parts with the result of producing two holdings, one of which would have been land without buildings, and the other buildings without land. In this case, the separation of the mill and its appurtenances will leave the rest a good farm with a good house and outbuildings upon the farm. There is nothing in the suggested difficulty about the control of the water-power. It will be obviated by a proper demarcation of the boundary of the land going with the mill, with a proper reservation of the usual powers of maintaining mill-power derived from water running through lands of different owners.

WALKER, L.J.:—

I concur. The landlord here has one holding of 111 acres, on which there is a mill, stated to have been built by the tenant, with a yard attached to it; the whole comprising about two acres.

The question, I think, is whether the landlord would be substantially as well off if he were the landlord of the agricultural holding and dwelling-house as one take, and the landlord of the mill and water-power as another. If he waived the right and jurisdiction to separate and have a fair rent fixed on the agricultural holding, according to the evidence given for the landlord, the mill, as such, was a very valuable property to be let for the various purposes he specified.

(1) [1899] 2 I. R. 51.

Appeal. 1900.

RYAN, *Tenant;* O'BRIEN, *Landlord.*

Walker, L.J.

The principal ground assigned for depreciation was, that the mill-race would be out of the control of a tenant of the separate mill; but it appears already that even now the mill-race and water-power pass through lands other than those comprised in this holding. And, I think, when the separation comes to be made it will be right, under the section, to put upon the tenant of the agricultural part of the holding the obligation of doing no act to injure the water-power, and to allow access to the occupier of the mill-holding for the purpose of making repairs.

I think the tenant has discharged the *onus* put upon him by the section, and that the case should be remitted, to make the separation and proceed under the section.

HOLMES, L.J.:—

I think that the best way to apply the test prescribed by sect. 5, sub-sect. 2, of the Act of 1896—that apart from the fixing of a fair rent, the separation of the property into two parts, will not diminish the value of the landlord's interest—is to assume that the landlord has resumed possession of the holding, and to consider whether it would let as well divided as if it were kept together. I have come to the conclusion that in the present case a prudent owner would divide the holding, and that it would be for his advantage to do so.

The dwelling-house, with the agricultural land around it, situated within a mile of a county town, could be let readily at a good rent. There would be no want of applicants, and the landlord could choose the most desirable of many. To the class of people who would take such a holding, the fact of there being a large unoccupied corn-mill attached to it, so far from being an attraction, would appear a disadvantage. The tenant could not work it, as it used to be worked. The milling business has long since ceased to be remunerative in Ireland; and this mill has shared the fate of a hundred others like it. Whatever chance there would be of making the mill premises productive would be to let or sell them to a business man, or company, with the view to their being converted into some other kind of industrial undertaking suitable to the present time and the existing state of the country. But a purchaser or tenant acquiring them for this purpose would

Appeal. 1900. RYAN, *Tenant;* O'BRIEN, *Landlord.* Holmes, L.J.

probably not want the dwelling-house and land at all, and at all events would not give so high a rent for the latter as could be obtained if they were offered to the public as a separate holding. I probably should not have arrived at this conclusion if there was evidence to show that the separation of the mill and its accessories from the rest of the holding would have detracted from the value of the residence and farm; but I am satisfied of the contrary by an inspection of the map, and indeed, this has not been argued.

It is the mill premises which it is suggested would be injured by the separation, such injury arising from the want of a dwelling-house to be used therewith, and from the owner of the mill being deprived of control over the mill-race. There is, however, a house for the working miller attached to the mill, which could be occupied by the foreman of the business to be carried on hereafter; and it is most unlikely that any other residence on the spot would be required by any future tenant or purchaser. As to the mill-race, after the separation the owner of the mill would have the same power of control over it which he has at present over the portion of it that does not run through the holding—a power of control regarded by the law as amply sufficient to protect his rights.

For these reasons, I am of opinion that the division of the property will not diminish the landlord's interest, and that, therefore, the appeal ought to be allowed.

Solicitor for the landlord: *Anthony Nolan.*
Solicitor for the tenant: *J. P. Hall.*

R. D. M.

HENRY *v.* THE GUARDIANS OF THE ANTRIM UNION (1).

Q. B. Div. 1900.

April 24. May 4, 10.

Medical officer — Vacation — "Not exceeding" — "Allowed" — Board of Guardians — Local Government Board — Local Government (Ireland) Act, 1898 (61 & 62 *Vict. c.* 37) — *General Rules for the Government of Dispensary Districts, Article* 28.

Article 28 of the General Rules of the Local Government Board for the Government of Dispensary Districts, does not entitle a medical officer to a full four weeks vacation in the year. The Board of Guardians is the proper authority to fix the length of the vacation, not exceeding four weeks, and the Local Government Board, while it may withhold approval of the arrangement made under which the medical officer is about to relinquish his duties, cannot fix a period of vacation different from that already fixed by the Guardians.

The approval of the Local Government Board of a period of vacation, longer than that allowed by the Guardians, does not entitle the *locum tenens* appointed under the arrangement to remuneration for the longer period.

CASE stated for the opinion of the Queen's Bench Division of the High Court of Justice in Ireland by the Right Honorable Mr. Justice Gibson at the Spring Assizes for the county of Antrim, 1900. The case was as follows:—

1. This was an appeal from a decree in favour of the plaintiff, as *locum tenens* of Dr. Torrens, who was doctor of a dispensary in the Union. The question depends on the effect of Article 28 of the Local Government Board Regulations, and on the right of the Local Government Board and the Guardians to fix the duration of holidays, subject to the maximum limit imposed by the article.

2. On the 9th August Dr. Torrens applied to the Guardians for three weeks' holidays, and nominated the plaintiff, a qualified medical practitioner, to act as his *locum tenens*. On the same day the defendants passed a resolution sanctioning two weeks as the period to be allowed, and the plaintiff was informed thereof by letter on August 11th. The Local Government Board, however,

(1) Before PALLES, C.B., and JOHNSON and BOYD, JJ.

Q. B. Div. 1900.

HENRY v. GUARDIANS, ANTRIM UNION.

approved of a three weeks' holiday, at a remuneration of two guineas a week, amounting to six guineas (Letter 30th August, 1899). This amount the Local Government Board directed the Guardians to pay by letter of November 1st.

3. Dr. Henry discharged his duties for three weeks, and sent in his account on September 28th. A resolution of October 6th, passed by the Guardians, was entered.

4. The several letters and resolutions hereinbefore referred to, and Regulations of the Local Government are to be deemed incorporated with this case. Liability for four guineas was admitted.

The question for the opinion of the Court is whether the plaintiff is entitled to be paid two guineas for the third week, and whether Dr. Torrens was entitled to a third week's holiday.

If the answer is negative, then the action is to be dismissed. If affirmative, the decree is to be affirmed.

J. G. GIBSON.

Dated at Belfast, the 19th March, 1900.

Article 28 of the General Rules of the Local Government Board for the government of dispensary districts provides, amongst other things, "Each medical officer shall be allowed an annual vacation, not exceeding four weeks, and the Guardians shall pay to the medical practitioner employed temporarily to discharge the duties of medical officer for that period, such reasonable remuneration for his services as the Local Government Board shall approve or direct. The medical officer shall not relinquish the discharge of his duties until he submits an application to the Guardians nominating a duly qualified practitioner who undertakes to perform the duties of temporary medical officer at a rate of remuneration to be stated, and until the Local Government Board express their approval of the arrangement made."

The Right Hon. The Macdermot, Q.C. (with him *R. C. K. Wilson*), for the defendants:—

The words "not exceeding" mean that the Guardians may not give the medical officer more than four weeks' vacation; but they may give him less. The "application" is to be submitted to the Guardians, which casts upon them the duty of adjudicating

thereon, and the function of the Local Government Board does not arise until all is settled, when they may, or may not, "express their approval of the arrangement made." The "arrangement" referred to is necessarily one to which the Board of Guardians must be party on some side. If the Local Government Board do not approve, their only power under the articles is to reject it altogether. They have neither power to alter the "arrangement," nor to enforce the adoption by the Guardians of the "arrangement" in any altered form. [He referred to *The Queen (Smith)* v. *The Vestry of St. George, Southwark* (1) and *M'Carthy* v. *The Guardians of the South Dublin Union* (2).]

Robert Todd, for the plaintiff:—

There is nothing in the Act which gives the Guardians the right to fix the length of the vacation or the amount of the remuneration of the substitute. These matters are altogether in the hands of the Local Government Board. By the use of the words "shall be allowed" the medical officer may have any period of vacation he likes up to four weeks. The Guardians have no other function in the matter than to receive the application for leave of absence and the nomination of the substitute, with a statement of the proposed rate of remuneraton, for transmission to, and approval of, the Local Government Board. The "arrangement" made cannot be said to be unalterable by the Local Government Board when they have the peremptory right of directing the rate of remuneration.

Matheson, Q.C. (with him *George C. Green*), for the Local Government Board:—

No function is vested in the Guardians except that they "shall pay" as the Local Government Board "shall approve or direct."

[JOHNSON, J.:—Who is to fix the length of the vacation?]

The medical officer himself, provided it does not exceed four weeks, and that the arrangement meets with the approval of the Local Government Board.

[PALLES, C. B.:—Can he choose any four weeks?]

He can take a week at any time, provided the whole period taken does not exceed four weeks in the year.

(1) 19 Q. B. D. 533. (2) I. R. 2 C. L. 97.

Q. B. Div. 1900.

HENRY v. GUARDIANS, ANTRIM UNION.

[PALLES, C. B. :—Who is to determine the inferior limit?]

The medical officer. It would be oppressive to give the local body the power of saying that he should have only three or two days' leave in the year.

[PALLES, C.B. :—Your construction gives no effect to the words "not exceeding" in the Article.]

There is authority in *Palmer* v. *Newell* (1) for the proposition that the words "not exceeding" do not necessarily imply a discretion. They must be read with the context. By sect. 8 of the Medical Charities (Ireland) Act, 1851 (14 & 15 Vict. c. 68), the Committee of Management, which is now represented by the District Council, appoints the medical officer, but he is only removable by the Local Government Board. The same section gives the Local Government Board power to regulate salaries and allowances. [He referred to Articles 22, 23, 26, and 27 of the General Rules for the Government of Dispensary Districts.]

R. C. K. Wilson, in reply.

May 10

PALLES, C.B. :—

Dr. Torrens was the paid medical officer of the defendants' Union. On the 9th August, 1899, he applied for three weeks' vacation, and nominated the plaintiff, a qualified medical practitioner, to act as his *locum tenens*. On the same day the defendants passed a resolution, sanctioning two weeks as the period to be allowed; and the plaintiff was informed of this on the 11th August. The Local Government Board, however, approved of Dr. Torrens having a vacation of three weeks, and fixed the remuneration of the plaintiff at two guineas a week.

The plaintiff discharged the duties of medical officer for three weeks. He was paid by the Guardians the sum of four guineas, being the remuneration at the stipulated rate for the two weeks' vacation which they had allowed Dr. Torrens. The present Civil Bill is brought by the plaintiff to recover two guineas, being the remuneration at the stipulated rate for the third week. The question for us is, are the Guardians liable for this sum of two

(1) W. N. 1872, p. 9.

guineas? The amount is small; but the question involved is one of very general application, and the solution of it depends upon considerations of importance as to the respective rights and powers of Guardians of the poor, and of the Local Government Board.

By the 14 & 15 Vict., c. 68, s. 8, the appointment of the medical officer of a district was (subject to the approval of the then Poor Law Commissioners), vested in the committee for the management of the dispensary of the district, appointed under sect. 7 of that Act. The qualifications of the medical officers were to be such as the Commissioners should determine, and the salaries were to be fixed by the Guardians, subject to the approval of the Commissioners. The Commissioners were further empowered to regulate the amount of salaries or allowances, and the time and mode of payment thereof, to remove any medical officer on sufficient grounds, to direct the committee to appoint another medical officer in his stead, and on failure of the committee for a month after the receipt of the direction to appoint a medical officer the Commissioners were empowered to appoint such medical officer themselves. The Commissioners, however, had not power to appoint save in the event of such failure.

By sect. 12 the Commissioners were directed to frame general Rules and Regulations for the government of dispensary districts, and for the guidance and control of Guardians, committees of management, and officers, to revoke and alter the same, and to make such new rules and regulations from time to time as they might think fit.

By the Local Government (Ireland) Act, 1898, sect. 30 (61 & 62 Vict. c. 37) the business of the committees of management of dispensary districts was transferred to the Guardians of the Unions. The defendants, therefore, have now the power to appoint the medical officer. The Local Government Board (in whom the powers of the former Poor Law Commissioners are now vested) have made rules for the guidance and control of the Guardians and officers; and the question to be determined by us depends largely upon the construction to be given to Article 28 of those Rules. That Article provides that "each medical officer shall be *allowed* an annual vacation *not exceeding* four weeks; and the Guardians shall pay to the medical practitioner employed

Q. B. Div. 1900. HENRY v. GUARDIANS, ANTRIM UNION. Palles, C.B.

temporarily to discharge the duties of the medical officer for *that period*, such reasonable remuneration for his services as the Local Government Board shall approve or direct." The words "*that period*" clearly refer to period allowed, not necessarily to the "four weeks."

Much argument has been expended upon the meaning of the word "allowed" in this Article, but this word must be taken in connexion with the words which refer to the length of the vacation, "not exceeding four weeks." These latter words taken by themselves are insufficient to determine the length of the vacation, and it seems to me to be plain that, in every case, there must be an act which shall define the length of that vacation, not exceeding the *maximum*; and that the word "allowed" refers to the act which so makes certain that length.

It was argued for the plaintiff that "allowed," in this context, meant "entitled to," and that each medical officer is entitled to such annual vacation as he may think proper to take, not exceeding the maximum of four weeks; but we are of opinion that it is impossible that this construction can prevail. We think that the word "allowed," as it appears in the context here, points to the act of an external authority which shall fix the length of the vacation; and thus we are of opinion that the real question is, what is the external authority that is to "allow"? Is it the Guardians, or is it the Local Government Board?

Upon this question, the subsequent words of the article are important. "The medical officer shall not relinquish the discharge of his duties, until he submits an application to the Guardians, nominating a duly qualified practitioner, who undertakes to perform the duties of temporary medical officer, at a rate of remuneration to be stated, and until the Local Government Board express their approval of the *arrangement made*." This provision must be read in connexion with Article 27. "The Board of Guardians shall pay to each paid officer, or temporary medical officer *duly authorised and appointed* for the service of the dispensary district, such salary as the Local Government Board may, from time to time, approve or direct."

There are three classes of cases in which it is necessary for the Guardians to appoint medical officers under the Act 14 & 15

Vict. c. 68:—(1) cases of vacancy in the office of the permanent medical officer; (2) cases within Article 22, viz. cases of the medical officer being temporarily incapacitated by illness or other cause from performing his duties; and (3) cases in which the medical officer is to be allowed a vacation.

It is unnecessary to say anything in reference to the first class of cases.

In cases of the second class, the relieving officer (under Article 22) is to make the necessary arrangements for the discharge of the duties of the medical officer, pending the meeting of the Board of Guardians, to whom he is to report; and if the necessity still exists, the Board of Guardians are either to continue "such employment" (by which is meant the employment of the temporary medical officer selected by the relieving officer), or make such other *arrangements* as they shall deem fit for the discharge of the medical officer's duties during his temporary incapacity. The officer whose services may be availed of under these circumstances, is called in this Article 22, "temporary medical officer." His right to the payment of remuneration, under Article 27, depends upon his having been "duly appointed for the service of a dispensary district"; and I cannot doubt that the arrangement by a Board of Guardians under Article 22, that a medical gentleman approved of by them should temporarily discharge the duties of the incapacitated medical officer, amounts to an appointment by them under sect. 8 of the Act of 1851, and that it, when sanctioned by the Local Government Board, entitles the person so appointed to payment of such remuneration as shall be fixed by the Board.

Further, it seems to me that in order to be a temporary medical officer during the vacation of the permanent officer, the temporary officer must be *appointed* by the Guardians; and I must assume that Article 28 contemplated an appointment by the Guardians of the temporary medical officer for the period allowed to their permanent officer as his vacation. If it did not, it would, in my opinion, be *ultra vires*.

Now, four things, and four things only, are in terms stated in Article 28 to be conditions precedent to the medical officer relinquishing the discharge of his duties, viz. (1), an allowance of a certain period, not exceeding four weeks, as his vacation; (2), a

Q. B. Div. 1900.

HENRY v. GUARDIANS, ANTRIM UNION.

Palles, C.B.

submission by the medical officer to the Guardians of an application to them, nominating a duly qualified practitioner; (3) an undertaking by that practitioner to perform the duties of medical officer, at a rate of remuneration to be stated; and (4), the approval of the Local Governmont Board of what is called in the Article "the arrangement made."

Now, what is "the arrangement" thus referred to? If it means simply the application of the medical officer, nominating the duly qualified practitioner, and the undertaking by the latter to perform the duties of temporary medical officer in the mode specified in the Article, the result would be that the portion of the Article which deals with the allowance of the annual vacation would be *ultra vires* and void, because in such a case there would be no appointment of the temporary medical officer by the Guardians; and no Rule could deprive the Guardians of their right of appointment, except in the event of their failure to appoint for a month. Therefore, to render this portion of the Article valid (and if it be not valid of course the plaintiff cannot recover), we must hold that "arrangement" includes something more than the submission to the Guardians of the medical officer's application and the undertaking of his nominated practitioner to perform the duties. What, then, does it mean? It must mean something that has been consented to, and which before it is submitted to the Local Government Board answers the description of "arrangement." Therefore it cannot be an arrangement with the Local Government Board. I am clearly of opinion that, to hold the Article legal, we must attribute to it the meaning of "arrangement with the Guardians." This arrangement must include the term for which it is to endure. In other words, the Guardians must be parties to determining the length of the vacation.

I hold, therefore, that in order to obtain his annual vacation, it is necessary not only that the medical officer should submit an application to the Guardians, specifying the time he seeks to be allowed, and nominating a duly qualified practitioner, with his undertaking to perform the duties, but also that there must be a consent of the Guardians to that application either as originally made or as ultimately modified. By such consent, the Guardians

"allow" the vacation, and appoint as temporary medical officer the person nominated. The approval of the Local Government Board to this "arrangement" amounts to a sanction of the appointment of the nominated person as temporary medical officer. I entirely reject the argument advanced for the plaintiff, that the Guardians are to be a mere conduit pipe to pass on the application from the medical officer to the Local Government Board. I hold that they must have authority to approve or disapprove of the proposal of the medical officer, authority to determine whether the period for the commencement of the vacation is convenient, having regard to the then state of the public health of the district, whether the period over which it is to extend is reasonable, and whether the nominated medical practitioner is the person who ought to be appointed. Reading the Article in this way, I bring the temporary medical officer into direct privity with the Guardians, and make him responsible *to them* for the due performance of his duties; I allow scope for the exercise of the powers of the Guardians under the 14 & 15 Vict. c. 68, s. 8; and I attribute to the word "allowed" a reasonable meaning. To adopt any other construction I should make the temporary medical officer a mere stranger to the Guardians; I should hold that his duty was one due to the permanent medical officer, and not to the Guardians, the authority responsible for the public health; I should ignore the right of the Guardians to select the person who is to be temporary medical officer; and refer the word "allowed" to some action by the person *to whom* the allowance was made.

For these reasons I am of opinion that Dr. Torrens is not entitled to the third week's vacation; and consequently that the plaintiff is not entitled to be paid the two guineas for the third week; and that the question reserved should be answered in the negative.

Each party must abide his own costs of the argument.

JOHNSON, and BOYD, JJ., concurred.

Solicitor for the plaintiff: *John K. Currie.*
Solicitor for the defendants: *L. J. Holmes.*
Solicitors for the Local Government Board: *Meeredy & Son.*

J. L.

Q. B. Div. 1899.

Nov. 16.

IRISH LAND COMMISSION *v.* O'FLAHERTY (1).

Arrears of Rent (Ireland) Act, 1882 (45 & 46 *Vict. c.* 47, *s.* 16)—*Rentcharge —Purchase of Land (Ireland) Acts—Vesting Order—Merger.*

An order of the Irish Land Commission, under the Purchase of Land (Ireland) Acts, purporting to vest the lands in the tenant in fee-simple, subject to an impropriate tithe-rentcharge, but freed from all other charges, does not release the lands from a then existing rentcharge created under the 16th section of the Arrears of Rent (Ireland) Act, 1882.

Case stated by the Right Hon. Mr. Justice Murphy, in the following terms:—

This was a civil bill appeal, which came on for hearing before me at the Kerry Summer Assizes for 1899. It was a civil bill brought by the Irish Land Commission, as plaintiffs, against Thomas O'Flaherty, as defendant, for £15 15*s.* 2*d.* arrears to 1st January, 1899, of an annuity of £1 0*s.* 4*d.* charged on defendant's holding, consisting of 48 acres of the lands of Milltown, in the county of Kerry. The following facts and documents were admitted as the common case of both sides:—

In 1883, the defendant and his then landlord of said holding made a joint application to the plaintiffs under the 16th section of the Arrears of Rent (Ireland) Act, 1882, for an advance in respect of arrears of rent. The plaintiffs made said advance, amounting to £20 6*s.* 3*d.*, and by order dated the 29th September, 1883, charged said holding with the repayment thereof by a rentcharge of £1 0*s.* 4*d.*, payable by two equal half-yearly payments on 1st January and 1st July in every year, during 35 years, from 1st day of July, 1883; the first payment to be made on the 1st January, 1884.

In 1889, the defendant, under the Purchase of Land (Ireland) Acts, by means of an advance of £700 from the Irish Land Com-

(1) Before Pallis, C.B., and O'Brien, Boyd, and Kenny, JJ.

mission, purchased for the said sum of £700, his said landlord's reversion in fee in said holding, subject to a certain impropriate tithe rentcharge; and by a vesting order made by the Irish Land Commission on the 1st July, 1889, pursuant to the Acts in that behalf, it was ordered and declared that the said part of the lands of Milltown should vest, and were thereby vested, in the defendant in fee-simple, subject to the said impropriate tithe rentcharge, and subject to and charged with the payment to the Land Commission of the said advance of £700, with interest thereon, by an annuity of £28 for 49 years, but freed from all other charges.

It was admitted that the arrears claimed by the civil bill are unpaid, and that no payment was ever made on foot of the rentcharge of £1 0*s.* 4*d.* The charging order and vesting order and certificate of arrears due are to be taken as incorporated in this case.

The contention of the defendant before me was, that the vesting order released the holding and himself from the rentcharge. It was argued on behalf of the plaintiffs that the vesting order only vested in defendant the landlord's reversion in fee, and that it was only such reversion in fee that was conveyed to defendant, freed from all charges except those specifically mentioned. It was insisted that the vesting order did not deal with or affect charges already existing on defendant's tenancy in the holding, and reliance was placed on sect. 8 of the Land Purchase Act of 1885, and on sect. 14, sub-sect. 3, of the Act of 1887, declaring that in cases like this the new interest vested in a tenant purchaser is deemed a graft on his previous tenancy, and subject to any rights or equities attaching thereto.

The question for the decision of the Court is whether the vesting order released the defendant's tenancy in the holding from the rentcharge, and the defendant from all personal liability therefor. If it did, the dismiss is to be affirmed with costs. If it did not, the dismiss is to be reversed, and a decree given for the plaintiffs for £15 15*s.* 2*d.*, with costs of appeal and of the hearing in the County Court.

Dated this 11th day of October, 1899.

JAMES MURPHY.

Q. B. Div. 1899.

IRISH LAND COMMISSION v. O'FLAHERTY.

Bourke (*Q.C.*, with him *D. M'Carthy Mahony*), for the plaintiffs:—

The vesting order only vested in the defendant the landlord's reversion in fee. It was such reversion in fee, apart from the tenant's interest, that was conveyed to the defendants, freed from all charges except the one specifically mentioned. The vesting order does not deal with or affect charges already existing on the defendant's tenancy in the holding. By section 8 of the Purchase of Land (Ireland) Act, 1885, and section 14, sub-section 3 of the Land Law (Ireland) Act, 1887, the new interest vested in a tenant purchaser is deemed to be a graft on his previous tenancy, and is subject to any rights or equities arising from its being such graft. The Land Commission on these occasions only investigate the title of the vendor; they never go into the tenant's title at all.

[O'BRIEN, J.:—Did not the Statute of Limitations begin to run from the first default in payment of these instalments?]

That question was not raised before Mr. Justice Murphy; nor is it reserved in the case stated.

Bernard, for the defendant:—

A vesting order, by sect. 8, Purchase of Land (Ireland) Act, 1885, has the effect of a Landed Estates Court conveyance, subject to the exception specified in the vesting order. The language of the section is exhaustive, and goes into detail. It states:—The lands shall vest in the purchaser (*a*), freed from all charges, if the vesting order so declares; or (*b*) subject to such charges as may be specified in such order; or (*c*) if the vesting order so declares, subject to such charges as may lawfully affect such holding. The vesting order, therefore, becomes the criterion for ascertaining the charges, if any, affecting the lands. This charge should have been set out in the vesting order, and the Land Commission are bound by their own order, even though inaccurate. Subject to the charges so set out, the vesting order has the effect of a Landed Estates Court conveyance. Such a conveyance has frequently been held to pass the estate of an owner who was a stranger to the suit.

M'Carthy Mahony, in reply.

PALLES, C. B. :—

We are of opinion that the question whether the vesting order operated as a release of the lands from the annuity in question is distinct from that of merger. The tenant acquired the fee-simple by the vesting order, but under the eighth section of the Act of 1885 and the fourteenth section of the Act of 1887 the new interest was a graft upon, and became subject to, all the charges that at the time of the conveyance affected the interest of the tenant. What were the charges that existed at the time of the vesting order? Plainly one was this annuity of £1 0*s.* 4*d.* a-year. These few words dispose of the only question reserved. I hold that we are not at liberty under the reservation to consider the question of the Statute of Limitations, nor can we go into the question, which I personally consider well worthy of consideration, whether the intention of the Act of Parliament was not that annuities created, as in the present case, should not be allowed to exist as unpaid annuities for the period during which the arrears sued for here accrued. The statute says that in the event of the annuity being in arrear, then the capital sum advanced to the landlord shall become payable, and *shall be* raised by a sale. It is difficult to contend that these words are merely permissive, or that the provision is one for the benefit of the Land Commission solely, so as to be capable of being waived by them. I look upon the Act as one passed in pursuance of a public policy, one portion of which policy was that many years' arrears of these annuities should not be allowed to hang over, and continue to affect, the interest of the tenant, but that if the gales were not punctually paid, the tenant's lands should be transferred by sale to someone who was able to pay the accruing gales, and out of whose purchase money the arrears for one year would be paid. That question, however, is not reserved, we are not to decide it, and I do not express any concluded opinion upon it. I, however, guard myself from holding that if that question were open for consideration here, I should hold that this decree should be affirmed. The question reserved

Q. B. Div. 1899.

IRISH LAND COMMISSION v. O'FLAHERTY.

must be answered in the negative, without regard to the matters I have mentioned; but in consequence of the long delay, the Land Commission should not have the costs of the argument.

O'BRIEN, BOYD, and KENNY, JJ., concurred.

Solicitor for the plaintiffs: *F. C. Downing.*
Solicitor for the defendant: *J. P. Broderick.*

J. L.

Q. B. Div. Probate. 1900.

Feb. 12.

IN THE GOODS OF TWOMEY, DECEASED; O'LEARY *v.* STACK (1).

Practice—Costs, security for—Defendant caveator—Permanent residence out of jurisdiction—Temporarily resident within the jurisdiction—Commencement of action—"Plaintiff"—Probate Rules (Contentious) 1865, 115, 116; Rules of Supreme Court (Ireland) 1891, Order XXIX., Rule 4.

A defendant caveator who is ordinarily resident outside the jurisdiction, but who is temporarily within the jurisdiction, cannot be called on to give security for costs under Order XXIX., Rule 4, of the Rules of 1891. The word "plaintiff" in that rule does not include a defendant caveator in a Probate action.

It is premature to apply for an order for security for costs before the issuing of a writ of summons asking for a grant of probate of the alleged will.

Circumstances under which a defendant caveator, though successful in resisting an application for security for costs, may be ordered to pay the costs of the motion.

MOTION.

Edward Twomey of the city of Cork died November, 1899, having made a will, dated the 23rd October of the same year, of which he appointed the plaintiffs executors.

On December 11th, 1899, a caveat was entered on behalf of Mrs. Margaret Stack, a sister of the deceased, who was a married woman, residing in San Francisco, in California. The caveat was warned on 15th December, and an appearance was entered thereto

(1) Before ANDREWS, J.

on the 23rd of the same month. On 3rd January, 1900, a notice requiring security for costs was served on the solicitor of Mrs. Stack by the solicitors of the plaintiffs; and on January 29th an application was made to the Court for an order that within ten days security for costs should be given by Mrs Stack, as being permanently resident in California, for the costs of the proceedings rendered necessary by her caveat, and that in default of her so doing the caveat and appearance entered on her behalf should be set aside. When the motion came on for hearing it appeared that a writ of summons had not been issued claiming probate of the alleged will, and Andrews, J., held that, as there was no pending action, the application was premature, and adjourned the hearing of the motion for a fortnight, the solicitor of the caveator, Mrs. Stack, undertaking to accept service of the writ on her behalf and to enter an appearance thereto. A writ was issued on February 1st, asking for probate of the will, against Mrs. Stack, as sole defendant, and the adjourned motion came before the Court on February 12th. The defendant Mrs. Stack was then in Ireland, having come thither for the purpose of contesting the alleged will, and stated her intention of remaining within the jurisdiction until the termination of the litigation in reference to it.

D. M'Carthy Mahony, for the plaintiffs:—

Both under the former Probate Rules, and by the express decision of Warren, J., in *Lambert* v. *Bassett* (1), a defendant who had lodged a caveat and appeared to the warning is liable to be called upon to give security for costs in proper cases, and there is no difference in this respect between the position of such caveator and an ordinary plaintiff. Therefore the term "plaintiff" in Order XXIX., Rule 4, must include a defendant who by appearing to the warning has rendered contentious proceedings necessary.

H. Cole Bowen, for the defendant:—

The decision of Warren, J., in *Lambert* v. *Bassett* (1) was based upon *Robson* v. *Robson* (2), and now that all probate actions are

(1) I. R. 11 Eq. 291. (2) 3 Sw. & Tr. 568.

Q. B. Div. 1900.

In the GOODS OF TWOMEY, DECEASED; O'LEARY *v.* STACK.

under Order I., Rule 1, commenced by writ, the distinction between a defendant who enters a caveat and then appears to the warning, and a defendant who appears in answer to a citation no longer applies; and in any case the term "plaintiff" in Order XXIX., Rule 4, cannot be extended to include a defendant caveator in a probate action. The terms of Rule 1 of the same Order as to the parties to give security are quite general, and when "plaintiff" is specified in Rule 4 it must mean the actual plaintiff in the action. As to the previous practice on this point, see *Redmond* v. *Mooney* (1); *Redondo* v. *Chaytor* (2); *Ebrard* v. *Gassier* (3).

ANDREWS, J.:—

A question of considerable importance is involved in this application, by which an order is asked for that the defendant Mrs. Margaret Stack (who is one of the next-of-kin of the deceased and who has entered a caveat) do give security for costs. When the application was first made there was no pending action, but a writ has since been issued and served. When the application was first mentioned Mrs. Stack was resident in America, and until a few days ago it did not appear that she had any intention of coming to Ireland. She has now, however, arrived in this country for the purpose of contesting the alleged will of the deceased, and she states her intention to remain in Ireland (which I see no reason to doubt) until this suit is terminated. Her permanent residence is out of this country; but if she had not gone to reside abroad the mere fact of her want of means would not have been a sufficient ground for preventing her as a next-of-kin from contesting the alleged will unless she gave security for costs.

If on the mere ground of absence of means the Court were to prevent a defendant, who as a next-of-kin had a right to contest an alleged will from asserting that right, unless on the terms of giving security for costs, there might be a denial of justice in cases in which the order to give security could not be complied with.

(1) 14 Ir. C. L. R. Appendix XVII. (2) 4 Q. B. D. 453.
(3) 28 Ch. D. 232.

In actions other than probate actions defendants are held entitled to defend themselves without being required to give security for costs, unless they are in substance plaintiffs; but in the present case if Mrs. Stack had continued to remain resident abroad, as she is a caveator defendant, as distinguished from a cited defendant in a probate action, she could have been ordered to give security for costs, if the case were one in which it would have been proper to make such an order. Dr. Radcliff's order of 1st May, 1830 (referred to in Miller's Probate Practice, 2nd Ed. pp. 327–8) which was repeated in No. 115 of the rules (contentious) of 1865, and the practice in England sanction such an order being made in a proper probate case against a plaintiff or defendant, or an intervenient. But this does not apply to the existing state of things in the present action. *Crispin* v. *Doglioni* (1) is a case which has an important bearing on this subject. The facts are sufficiently stated in the head-note, which is as follows:—"The Court will not order the plaintiff to find security for costs when, though a foreigner, he is staying in England at the time of the application, and there is nothing to lead to the supposition that he is on the point of leaving the country. His affidavit in opposition to such an application need not state an intention of permanent residence." That was the decision of a very eminent and experienced Judge, and the case was one of a plaintiff who was the moving party in the proceedings. The report states that Dr. Spinks for the defendant "moved the Court to order the plaintiff to give security for costs. The plaintiff on his own showing is a foreigner living in Portugal, and is in this country merely for the purpose of carrying on this suit." Dr. Phillimore argued *contra*, and Sir C. Cresswell said: "This was a question as to security for costs. The case in the Exchequer which was cited," that is the case of *Tambisco* v. *Pacifico* (2), "and in which all the former cases were reviewed, comes to this, that where the party is in England, and there is no reason to suppose that he is on the point of going away, no order will be made for security for costs; and this seems to be recognized in the Queen's Bench. If he does go abroad you may stop the proceedings till security is given."

(1) 1 Sw. & Tr. 522. (2) 7 Ex. Rep. 816.

Q. B. Div. 1900.

In the Goods of Twomey, Deceased; O'Leary *v.* Stack.

Andrews, J.

In that state of the law our General Order XXIX., Rule 4, (1891), was made, which is of general application. It provides that a *plaintiff* ordinarily resident out of the jurisdiction may be ordered to give security for costs though he may be temporarily resident within the jurisdiction. There is an obvious distinction between the cases of a plaintiff and a defendant The plaintiff comes into Court; the defendant is brought into Court. The rule is expressly limited to the case of a plaintiff. I have no doubt that it was so framed deliberately, and I think it clear that it neither includes nor was intended to include the case of a defendant in other than probate actions or a defendant caveator in a probate action. Under Order II., Rule 1, probate actions are now commenced by a writ of summons; and in probate as well as other actions the word "plaintiff" means the person properly so-called, and cannot in my opinion be held to also refer to the person who lodges a caveat. I must therefore decline to grant this application, on which I shall make no rule; but as Mrs. Stack left everyone, including, as I gather, her own solicitor, under the impression up to the last that she was not coming to Ireland, and inasmuch as if she had at once stated her intention of coming here, and had come accordingly, a good deal of the expense which has been incurred in relation to this application would have been saved, though I make no rule on the motion, I shall direct her to pay £4 4*s.* towards the plaintiff's costs of the motion, which as it stood up to a day or so ago was a regular and reasonable one, and the costs of which the defendant has unnecessarily increased.

Solicitors for the plaintiffs: *O'Keefe & Lynch.*
Solicitor for the defendant: *Winder.*

R. W. L.

THE IRISH LAND COMMISSION *v.* RYAN AND OTHERS (1).

Appeal. 1900. Jan. 31. Feb. 27.

Estoppel — Judgment by default — Civil bill dismiss on the merits — Tithe rentcharge — Statute of Limitations — 3 & 4 Will. 4, c. 27, s. 34 — 37 & 38 Vict. c. 57, s. 1.

In the year 1890 the plaintiff sued certain defendants for a sum of £9 11*s.*, six years arrears of tithe rentcharge, payable in respect of certain titheable lands situate in the parish of G. and county of T. The defendants entered no appearance, and judgment was marked by default in the year 1891 for the sum claimed with costs, which the defendants subsequently paid. At the date the writ was issued and payment was made, it was now admitted that the defendants had occupied the lands for twelve years without any payment of, or acknowledgment of liability to, tithe rentcharge.

In the year 1896 the plaintiffs sued the defendants in the present case (who are to be taken as representing all the estate and interest of the defendants in the said writ and judgment) by civil bill for five years arrears of the tithe rentcharge, and the County Court Judge dismissed the case on the merits.

In the year 1899 the plaintiffs sued the defendants by civil bill for £3 3*s.* 8*d.*, being two years arrears of tithe rentcharge issuing out of the lands of B. in the parish of G. and county of T. The County Court Judge dismissed the case on the merits. The plaintiffs appealed to the Judge of Assize, who stated a case raising two questions—1, whether the plaintiffs' claim was barred by the Statute of Limitations; 2, whether the dismiss on the merits in 1896 estopped the plaintiffs from recovering in the present action:—

Held, by the Court of Appeal, that the defendants were not estopped by the judgment by default recovered in 1891 from setting up the Statute of Limitations; and that the effect of the Statute of Limitations was to extinguish the right to recover the tithe rentcharge where there had been neither payment nor acknowledgment for twelve years: but that the dismiss on the merits in 1896 would not have estopped the plaintiffs.

A judgment by default may operate by estoppel; but the ground and extent of that estoppel must be found on the face of the judgment itself, and cannot be inferred or deduced from the pleadings of the party, who has obtained the judgment, where the defendant has said nothing, and has merely allowed the judgment to go by default.

An unnecessary averment in a record, that is neither pleaded to nor admitted, cannot be used as an estoppel.

(1) Before LORD ASHBOURNE, C., and FITZGIBBON, and HOLMES, L.JJ.

Appeal. 1900.

IRISH LAND COMMISSION *v.* RYAN.

APPEAL from the decision of the Queen's Bench Division on a case stated pursuant to 27 & 28 Vict. c. 99, sect. 35, by Mr. Justice Johnson, on the hearing before him at the Tipperary Summer Assizes, 1899, of an appeal from a dismiss on the merits granted by His Honour the County Court Judge on the hearing of a civil bill.

The case stated set out the following facts:—

The civil bill was brought against Denis Ryan (Fahy), Philip Burke, Alice Quinlan, executrix *de son tort* or otherwise of William Quinlan, deceased, and Edward Quinlan, to recover £3 3*s.* 8*d.*, "being two years arrears of tithe rentcharge due and payable by the defendants to the plaintiffs up to and ending the 1st of November, 1898, and issuing out of the lands of Gortnaboley, in the parish of Glenkeen and county of Tipperary." The County Court Judge dismissed the case on the merits, and the plaintiffs appealed to the Judge of Assize.

In the year 1890, at which time the defendants in the hereinafter mentioned writ had occupied the said lands for twelve years without any payment or acknowledgment of liability for payment of tithe rentcharge, the plaintiffs issued a writ against James Ryan (Fahy), Edward Ryan, and Philip Burke, "all of Gortnaboley, Glenkeen, Borrisoleigh, in the county of Tipperary," claiming £9 11*s.* "for twelve half years gales of tithe rentcharge due and payable by the defendants to the plaintiffs up to and ending the 1st of May, 1890, in respect of certain titheable lands situate in the parish of Glenkeen in the Diocese of Cashel, and county of Tipperary, the defendants in said lands, having such an estate and interest as renders them liable to the payment of said tithe rentcharge to the plaintiffs and for 12*s.* 6*d.* costs, &c."

On the 30th June, 1891, the plaintiffs entered judgment by default against the defendants in the said action. This judgment was in the following form:—"The defendants James Ryan (Fahy), Edward Ryan and Philip Burke not having appeared to the writ of summons herein. It is this day adjudged that the plaintiffs recover against the defendants £9 11*s.* and £2 10*s.* 4*d.* costs. Judgment entered 30th June, 1891." A *fieri facias* was issued on the judgment the same day, and on 1st July, 1891, the defendants paid the amount of the judgment.

Appeal. 1900.

IRISH LAND COMMISSION *v.* RYAN.

From the year 1891 to 1896 no further payment of tithe rentcharge in respect of said lands was demanded or made.

In 1896 the plaintiffs issued a civil bill against Denis Ryan (Fahy), Philip Burke, and William Quinlan for five years arrears of the said tithe rentcharge. The County Court Judge dismissed this civil bill on the merits, merely stating in his decree which was in the usual form that, "the plaintiffs failed to prove said case or any part thereof." No appeal was taken from this dismiss by the plaintiffs.

Denis Ryan (Fahy) is son of said James Ryan, one of the defendants in the judgment recovered in 1891. The said Philip Burke was one of the defendants in the judgment of 1891, and since then he has bought the holding of the said Edward Ryan, who was also one of the defendants in the judgment of 1891.

William Quinlan is dead, and his name was struck out of the process by the County Court Judge on the hearing of the civil bill dismissed in the year 1896. Alice Quinlan, the defendant in the civil bill now pending, is widow of the said William Quinlan, and the other defendant, Edward Quinlan, is his brother, and both are in occupation of part of the lands of Gortnaboley.

The defendants claim to be owners in fee of their respective holdings in the townland of Gortnaboley.

It was contended on behalf of the defendants that the plaintiffs' claim was barred by the Statute of Limitations, and that the dismiss obtained in 1896, estops the plaintiffs from recovering in the present action.

Having set out the above facts, the case proposed two questions for the decision of the Court:—

1. Whether the plaintiffs' claim is barred by the Statute of Limitations?

2. Whether the dismiss on the merits in 1896 estops the plaintiffs from recovering in the present action?

The Queen's Bench Division (PALLES, C.B., JOHNSON, GIBSON, and KENNY, JJ.), answered both questions in the negative.

The defendants appealed to the Court of Appeal.

Appeal. 1900.

IRISH LAND COMMISSION v. RYAN.

Battersby (with him *Cherry, Q.C.*), for the appellants:—

1. The right of the Land Commission to recover the tithe rentcharge now sued for is extinguished by statute.

Tithe rentcharge is "rent" within section 2 of 3 & 4 Will. 4, c. 27: *Irish Land Commission* v. *Grant* (1). Section 34 of 3 & 4 Will. 4, c. 27, extinguishes the right to "rent," and consequently to tithe rentcharge, on the lapse of twenty years from the day on which the last payment was made: the period of twenty years is reduced to twelve years by 37 & 38 Vict. c. 57, sect. 1. Here it is admitted that for twelve years prior to the date when the writ was issued no tithe rentcharge had been paid by the defendants. Therefore at the time the Land Commission brought their first action the right to the tithe rentcharge sued for was extinguished. Once the title to the tithe rentcharge is extinguished by the statute, neither payment nor admission in writing will give the plaintiff the right to recover it: *Brassington* v. *Llewellyn* (2). No doubt Jessel, M.R., expresses himself to the contrary in *Bunting* v. *Sargent* (3); but Darby and Bosanquet (p. 362), state that the view there expressed cannot be supported; in any event, it is not consistent with *In re Alison*; *Johnson* v. *Mounsey* (4) and *Sanders* v. *Sanders* (5), where it was expressly laid down, that where the right is extinguished, neither payment of rent nor acknowledgment can restore it. See also *Hobbs* v. *Wade* (6) and *Kibble* v. *Fairthorne* (7): but the strongest case in favour of the appellants is *Hemming* v. *Blanton* (8), where the precise point is decided. There lands were granted by way of mortgage for a term of 1000 years, but no payment of principal or interest or acknowledgment was made or given for more than twenty years, during which period the mortgagor and those remaining under him remained in possession of the premises without interruption, and it was held that the title of the mortgagee under the mortgage was extinguished by the lapse of that period, and therefore that a payment of interest to the mortgagee under a decree in a foreclosure suit, after that period had elapsed, did not revive the title in the mortgagee so as to

(1) 10 App. Cas. 14; 13 L. R. I. 430.
(2) 27 L. J. Ex. 297.
(3) 13 Ch. D. 330.
(4) 11 Ch. D. 284.
(5) 19 Ch. D. 373.
(6) 36 Ch. D. 553.
(7) [1895] 1 Ch. 219.
(8) 42 L. J. C. P. 158.

enable him to bring ejectment. The judgment in this case expressly points out that "the statute of James destroyed the remedy, but that of Will. 4 the title." The case of *Stansfield* v. *Hobson* (1), which is distinguished in *Hemming* v. *Blanton* (2), might seem to be an authority against the appellants' contention, but it is dissented from by the Court of Appeal in *Sanders* v. *Sanders* (3).

2. The defendants are not estopped from setting up the defence of the Statute of Limitations by the judgment recovered by default in the year 1891.

To determine whether a judgment be an estoppel in a subsequent case, the Court can inquire into the facts on which that judgment was given: *Heath* v. *Weaverham Overseers* (4). A defendant, by allowing judgment to go by default in an action to which he has a good defence, is not estopped from pleading such defence in a subsequent action against him by the same plaintiff. Thus, where the plaintiff sued the defendant for rent which had accrued under an agreement to grant a lease in an action in which judgment by default was obtained, and brought a second action for further rent under the agreement, it was held in the second action that the defendant was not estopped from pleading that a yearly tenancy had by agreement between the parties been substituted for the defendant's interest under the agreement for a lease, and that such yearly tenancy had been duly determined before the cause of action accrued: *Howlett* v. *Tarte* (5). It has been held that where there are no pleadings in an action—as where a judgment is given by consent—the judgment does not operate as an estoppel: *Goucher* v. *Clayton* (6). Either party to a judgment may litigate again, provided the immediate subject of the decision be not withdrawn from its operation: *per* Knight-Bruce, V.-C., in *Barrs* v. *Jackson* (7). To make a judgment conclusive between the parties there must have been what Lord Justice James calls "a real fight between the parties": *Ex parte Banner* (8).

(1) 3 De G. M. & G. 620.
(2) 42 L. J. C. P. 158.
(3) 19 Ch. D. 373.
(4) [1894] 2 Q. B. 108.
(5) 10 C. B. (N. S.) 813.
(6) 34 L. J. Ch. 239.
(7) 1 Y. & C. C. C. 585.
(8) 17 Ch. D. 484.

Appeal 1900.

IRISH LAND COMMISSION v. RYAN.

Ronan, Q.C., and *Falconer*, Q.C. (with them *W. Gibson*), for the respondents:—

A judgment by default creates an estoppel: the only exception is in the case of an ejectment, and this exception is due to the Common Law Procedure Act, 1853: *Kenna* v. *Nugent* (1). The question here was, were the lands titheable: this question plainly appeared from the writ. The judgment of the Court that the plaintiffs should recover the sum claimed is conclusive not only with reference to the amount recovered, but also with reference to the grounds of the decision: *In re Alison* (2). The judgment concludes the parties not merely as to the point actually decided, but also as to the matter which forms the groundwork of the judgment, *i.e.* the liability to tithe rentcharge: *Reg.* v. *Hartington* (3). Therefore, as between the parties to the present action, these lands must be taken as titheable. If any question arises as to the identity of the lands out of which the tithe rentcharge, recovered by the judgment issued, it is a matter of evidence: *Outram* v. *Morewood* (4); *Flitters* v. *Allfrey* (5). The payment made under the judgment like an acknowledgment made by deed, operates as an estoppel so as to enable the tithe rentcharge to be revived, though it may have been extinguished by the Statute of Limitations: Darby and Bosanquet, p. 462. The plaintiffs are not estopped by the dismiss on the merits given in 1896, because nothing appears on the record as to what was the ground of the decision or the point decided between the parties. It would not be open to the Judge of Assize to supplement the record by finding in fact that what was determined was the point now raised as to the Statute of Limitations. The estoppel can only arise from matters appearing on the record: *Sintzenick* v. *Lucas* (6).

[*Jenkins* v. *Robertson* (7), *Houstoun* v. *Sligo* (8), *Irish Land Commission* v. *Junkin* (9), were also cited.]

Cur. adv. vult.

(1) I. R. 6 C. L. 547; 7 C. L. 464.
(2 L. R. 9 Ch. App. 1.
(3) 4 E. & B. 780.
(4) 3 East, 346.
(5) L. R. 10 C. P. 29.
(6) 1 Esp. 44.
(7) L. R. 1 Sc. App. 117.
(8) 29 Ch. D. 448.
(9) 24 L. R. Ir. 40.

LORD ASHBOURNE, C.:—

The judgment of the Court will be delivered by Fitz Gibbon, L.J.

FITZ GIBBON, L.J.:—

The first question upon this Special Case appears to me to raise a question of great importance, as to the foundation and extent of the estoppel created against a defendant by a judgment in default of appearance. I have been unable to find, in the multitude of cases upon estoppel, a single instance in which an estoppel was raised on such a judgment.

Upon the second question, I have no doubt that the dismiss on the merits in 1896 does not estop the plaintiffs from recovering in the present action if otherwise entitled to do so. The dismiss does not disclose the grounds upon which the action failed; nothing was therein *res judicata*, except that the sum of £3 3*s.* 8*d.* claimed in the civil bill was not then recoverable by the plaintiffs upon the cause of action stated in the dismiss. Consistently with that dismiss the claim in the present action may be recoverable, and therefore there can be no estoppel.

The answer in the negative to the first question, in the absence of any express decision, seems to me to involve a serious and indefinite extension of the doctrine of estoppel by matter of record, which ought not to be made except upon plain principle or clear authority, and in my opinion both principle and authority are against it. "Estoppels are odious as compelling a person to admit that to be true which is not true," though they have from the earliest times been enforced in order to put an end to litigation. They are legitimately used to prevent a party who has once been defeated in litigation from again litigating the question upon which he has been adjudged to be in the wrong. Their use is equally legitimate to prevent a party from reopening a matter which he has admitted upon a record, and respect to authority requires that no one who is bound by the judgment of a competent Court should be permitted to deny the truth of what has been recorded in the judgment, which is the act and pronouncement of the Court. But an estoppel which would be effected by the allegations of an opposite party, upon which issue had not been joined, and as to

Appeal. 1900.

IRISH LAND COMMISSION *v.* RYAN.

Fitz Gibbon, L.J.

which the party sought to be estopped had, at most, foregone an opportunity of litigating them, would have a far wider range. That a judgment by default has an operation by estoppel cannot be denied; but the ground and extent of that estoppel must, in my opinion, be found on the face of the judgment itself, and cannot be inferred or deduced from the pleading of the party who has obtained the judgment, when the defendant has said nothing, and done nothing, and has merely allowed the judgment to go by default. In the present case it may be admitted that the judgment of June 30th, 1891, estopped the then defendants from denying that the amount for which that judgment was given, for which a *fi. fa.* issued, and which they paid, was then due by them to the plaintiffs. But if we go beyond that, where can we stop? The only effect of the judgment upon the defendants was to compel the defendants to pay that sum. They paid it, but they made no statement or admission as to how it was due or why they paid it. Assuming the writ to be part of the record, it is only the plaintiffs statement. If the defendants owed the amount sued for, though on a different account, or even for rentcharge payable out of different lands from those appearing in the writ, they could gain nothing beyond a possible amendment of the writ by disputing the claim. Could it be held that if a man owned a titheable estate in Whiteacre and owned Blackacre tithe-free, and was by mistake sued for tithe out of Blackacre, and allowed judgment to go by default, and paid the sum which he really owed out of Whiteacre, his estate in Blackacre would be for ever thereafter charged with tithe by estoppel, or that the judgment had in effect created the charge? If he were afterwards sued, upon the liability which really existed, for tithe charged on Whiteacre, the judgment as to Blackacre could not be a defence, for the liability of Blackacre would not even be evidence that Whiteacre was tithe-free, and so long as the judgment stood, tithe could be recovered out of both estates, out of Blackacre by estoppel, and out of Whiteacre by lawful title. Again, if tithe was really payable out of some small plot of land by the owner of a large estate, and the tithe owner issued a writ in which it was alleged to issue out of all the defendant's lands, he would have no defence; he could not by any sort of plea raise an issue upon the extent of the lands charged.

If he allowed judgment to go by default, would his whole estate be thereby charged, and if he subsequently sold the titheable bit of land, would he and his successors be for ever estopped from denying that the estate which he retained had never been subject to tithe? This point closely touches the present case, for neither the writ nor the judgment contains any description whatever of the lands alleged to be charged. The only allegation is that the rentcharge issues out of "lands in the parish of Glenkeen," and if the estoppel is good for anything beyond the existence of the debt, it must be good to charge as titheable any and every parcel of land in that parish which can be proved to have been held for the first estate of inheritance by any one or more of the defendants in the former action at the date of the judgment.

The plaintiffs counsel admitted that if the defendants were estopped by the judgment from now proving that the rentcharge is barred by the Statute of Limitations, they must be equally estopped from proving that the lands which they now hold as the successors of estate of the defendants of 1891 were never subject to tithe at all, or that the former defendants were not then the owners of a titheable estate in all and every part of their lands in the parish of Glenkeen. It should surely require coercive principle, or binding authority, to give such effects as these to a judgment by default for £9 11*s.* upon a writ which possibly could not have been defended except at an expense beyond the sum claimed, and which defendants such as these would probably assume not to have been issued against them by such a body as the Land Commission until it had been ascertained that the sum claimed was probably due and legally recoverable, which it is now admitted it was not.

I shall presently refer to the bearing on the question of estoppel of the nature of the defence upon which the defendants now seek to rely, and to an authority which seems to me to show that there is no estoppel against such a defence. But I will first refer to some cases which seem to me to indicate that the doctrine does not extend beyond matters which have been put in issue, or admitted, or actually declared by judgment. Holmes, L.J., will deal more fully with the question of the sufficiency of the writ to create an estoppel, and I shall therefore not deal with that branch of the case.

Appeal. 1900. IRISH LAND COMMISSION v. RYAN. Fitz Gibbon, L.J.

The only suggestion of estoppel by a judgment by default which I can find in the books is in a *dictum* of Vaughan Williams, J., in *The South American and Mexican Company's Case* (1). He was dealing with a judgment *by consent*, but he says :—"It has always been the law that a judgment by consent, *or by default*, raises an estoppel just in the same way as a judgment after the Court has exercised a judicial discretion in the matter." He cites no authority for this proposition, and I can find none. The Judges in the Court of Appeal do not refer to a judgment by default, and it is curious that Vaughan Williams, J., himself, in the immediately preceding sentence, gives a reason which does not apply to such a judgment, for he says :—"The basis of the estoppel is that *when parties have once litigated a matter* it is in the interest of the estate that litigation should come to an end, and *if they agree* upon a result or upon a verdict, or upon a judgment, or upon a verdict and judgment, as the case may be, an estoppel is raised as to all the matters in respect of which an estoppel would have been raised by judgment if the case had been fought out to the bitter end." In the present case nothing has been litigated, and there has been no agreement, unless omitting to appear is litigation, or allowing judgment to go by default is agreement.

Boileau v. *Rutlin* (2) decides only that material facts alleged by one party which are *indirectly admitted by making a traverse of some other facts* cannot be again litigated, and are conclusively established by the judgment, but *only* if the traverse is found against the traversing party. *Alison's Case* (3), the only case on estoppel which appears to have been cited in the Queen's Bench Division, decides that a judgment is not only conclusive with reference to the actual matter decided, but also with reference to the grounds of the decision, *provided those grounds can be clearly discovered from the judgment itself*. *Regina* v. *Hartington* (4) decides that a judgment concludes not merely as to the point actually decided, but as to a matter which it was necessary to decide, *and which was actually decided*, as to the groundwork of the decision itself. *Jenkins* v. *Robertson* (5) decides that a decree obtained by arrangement

(1) [1895] 1 Ch. p. 45.
(2) 2 Ex. 665.
(3) L. R. 9 Ch. App. 1.
(4) 4 E. & B. 780.
(5) L. R. 1 Sc. App. 117.

cannot be *res judicata*, because the Court has bestowed no judicial examination on the merit of the question. In *Houstoun* v. *Sligo* (1) it was held that, in order to judge whether the same questions *were at issue* in the first action as in the second, the Court would look at the pleadings in the first action. But the arguments and the judgments indicate that it was necessary to show that the questions were "distinctly raised," and that "it was necessary to decide them as the groundwork of the actual decision," and that "there was no snapping of a judgment."

The case which, when closely examined, seems to me to rule this case is *Howlett* v. *Tarte* (2). It was an action, brought in 1861, for rent under an agreement of letting for a term of 99 years, dated September 29th, 1853, which agreement the section averred to be still existing and in force. The defendant pleaded that *after the agreement* it was agreed that a tenancy from year to year should be created in substitution for the former tenancy under the agreement; that this tenancy from year to year was determined by notice to quit at Michaelmas, 1858, before the accruer of the rent sued for, and that no rent ever became due afterwards. The plaintiff replied by way of estoppel that he brought an action against the defendant for the recovery of rent as having accrued under the agreement of 1853, after September 29th, 1858. That the defendant, being under terms to plead issuably, pleaded non-issuable pleas only, whereupon the plaintiff signed judgment as for want of a plea, and thereby recovered, by the judgment of the Court, the rent sued for in that action, and that the defendant submitted to and acquiesced in the said judgment, and satisfied and discharged the plaintiff's claim; that the defence now relied on existed, if at all, before and at the time of the commencement of the first action; whereupon the plaintiff prayed judgment if the defendant ought now to be permitted to plead the said plea. To this replication the defendant demurred, on the ground "that the facts set forth in this replication do not show any estoppel." If this case of *The Land Commission* v. *Ryan* were tried in the High Court, the first question on this special case might be raised by a defence, replication, and demurrer, in the very words of

(1) 29 Ch. D. 448. (2) 10 C. B. (N. S.) 813.

Appeal. 1900.

IRISH LAND COMMISSION v. RYAN.

Fitz Gibbon, L.J.

these pleadings in *Howlett* v. *Tarte* (1). The whole doctrine of estoppel, and the authorities from Co. Litt. and *The Duchess of Kingston's Case* (2) down were discussed, and the replication was held bad. The defendant's counsel, in support of the demurrer, quoted "the principles which govern estoppels" from Knight-Bruce, L.J., in *Barrs* v. *Jackson* (3), where the limitation is laid down that "however essential the establishment of particular facts may be to the soundness of a judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may be as to its immediate and direct object," the parties "may again litigate them for any other purpose as to which they may come in question, provided the immediate subject of the decision be not attempted to be withdrawn from its operation, so as to defeat its direct object." The only direct object of the judgment here was the recovery of £9 11*s*.

Williams, J., said:—

> "I think it is quite plain that there is no authority expressly in point to sustain the doctrine for which the plaintiff's counsel has contended, viz. that if there had been a previous action between the same parties, founded upon the same contract, and the defendant had suffered judgment by default in that action, he is precluded from setting up in a subsequent action any defence which he could have pleaded in bar to the former, notwithstanding the defence is in confession and avoidance of the agreement which is the foundation for the action. I think it is quite clear upon the authorities, and upon principle, that, if the defendant attempted to put upon record a plea which was inconsistent with any traversable allegation in the former declaration, there would be an estoppel, but the defence set up here is quite consistent with every allegation in the former action."

Willes, J., says:—

> "The question is, whether by allowing judgment to go by default, the defendant is estopped as to matter which he omitted to set up on the former occasion in every subsequent action at the suit of the plaintiff. It is an entirely novel proposition."

He quotes Lord Wensleydale in *Boileau* v. *Rutlin* (4):—

> "The facts actually decided by an issue in any suit cannot be again litigated between the same parties, and are evidence between them, and

(1) 16 C. B. (N. S.) 813.
(2) 2 Sm. L. C. 713.
(3) 1 Y. & C. C. C. 585.
(4) 2 Ex. 665, 681.

that conclusive, upon a different principle and for the purpose of terminating litigation, and so are the material facts alleged by one party which are *directly admitted* by the opposite party, or *indirectly admitted by taking a traverse* on some other facts, but *only* if the traverse is found against the party making it."

He adds for himself :—

"It is quite right that a defendant should be estopped from setting up *in the same action* a defence which he might have pleaded, but has chosen to let the proper time to go by; but nobody ever heard of a defendant being precluded from setting up a defence *in a second action*, because he did not avail himself of the opportunity of setting it up in the first action. I think we should do wrong to favour the introduction of this new device into the law."

Byles, J., says :—

"It is plain that there is no authority for saying that the defendant is precluded from setting up this defence. It was hard enough in actions at Common Law, where the defendant could only plead one plea: but to extend the rule to the case of an allegation not upon the record would increase the hardship tenfold. Suppose an action of covenant: the defendant had two defences—performance and release: he could not plead both: he elected to plead performance. Suppose that plea found against him. *He could not in a subsequent action plead non est factum*, but what authority is there for saying that he could not plead the release. Estoppels are not to be extended without authority."

Keating, J., said :—

"This is an attempt on the part of the plaintiff to extend the doctrine of estoppel far beyond what any of the authorities warrant."

I cannot distinguish that case from this. There rent had been recovered by a judgment in default of plea, under an agreement averred to be subsisting. Here rentcharge has been recovered in default of appearance under the Tithe Acts. There in a subsequent action it was held that the defendant was not estopped from pleading and proving that before the judgment the agreement of tenancy had been determined. How, then, can we estop these defendants from relying on the admitted fact that before the judgment the rentcharge had been "extinguished" by the Statute of Limitations? The plea which admitted the making of the agreement, but alleged its subsequent determination, is no more

Appeal. 1900.

IRISH LAND COMMISSION v. RYAN.

Fitz Gibbon, L.J.

and no less a plea in confession and avoidance than is the plea which admits that the defendant's lands were once subject to tithe rentcharge, but alleges that the tithe rentcharge has been extinguished. With *Howlett* v. *Tarte* (1) as an authority, it is hardly necessary to rely on the further argument supplied by the apparent anomaly of holding that, though neither a payment nor an acknowledgment can revive a rentcharge which has once been extinguished by the Statute of Limitations, a judgment by default will not only revive an extinguished rentcharge, but will create one that never existed before.

For these reasons, I am of opinion that the first question must be answered in the affirmative, and I only regret that the attention of the Lord Chief Baron was not called to the authorities which have assisted me to this conclusion.

The decision of *The Land Commission* v. *Junkin* (2) turns upon a different section of the Statute of Limitations, and the effect of a civil bill decree in saving a tithe rentcharge from being barred. It therefore does not touch the question of its effect in reviving a rentcharge already barred. I reserve the consideration of that decision until it becomes necessary. I believe that our order should reverse the order of the Queen's Bench on the first question, should answer that question in the affirmative, and the second in the negative; and, after directing the plaintiffs to pay the defendants' costs of the special case here and in the Queen's Bench, should remit the case to Johnson, J., in order that he may dismiss the plaintiffs' civil bill.

HOLMES, L.J. :—

This case was stated by Mr. Justice Johnson upon the hearing of a civil bill appeal brought by the plaintiffs to recover from the defendants, £3 3*s.* 8*d.*, being two years of tithe rentcharge up to and ending the 1st November, 1898, issuing out of the lands of Gortnaboley, in the parish of Glenkeen and county of Tipperary. The case, I think, assumes that the lands were at one time subject to tithe rentcharge; but it finds that in the year 1890 they had been occupied for twelve years by James Ryan, Edward Ryan,

(1) 10 C. B. (N. S.) 813. (2) 24 L. R. Ir. 40.

and Philip Burke, without any payment of tithe rentcharge or acknowledgment of liability therefor.

The argument proceeded in this Court, as also in the Queen's Bench Division, upon the basis that the effect of what I have stated was to extinguish the tithe rentcharge altogether, and that it could not be revived by any subsequent payment made or acknowledgment given by the persons who would have been liable thereto, if it had still continued to exist. I do not propose to consider a proposition accepted by both plaintiffs and defendants; but I may say that I have no reason to doubt its soundness.

On the 3rd November, 1890, the Land Commission issued a writ of summons in the Queen's Bench Division against the three persons above named, claiming £9 11*s.* for twelve half years gales of tithe rentcharge payable in respect of lands in the parish of Glenkeen, and in default of appearance obtained judgment thereon for £9 11*s.* and £2 10*s.* 4*d.* costs, which sums, after the issue of a writ of *fieri facias* were paid by the defendants on the 1st July, 1891.

The Irish Land Commission v. *Junkin* (1), decided in 1888, was referred to in the course of the argument, but it has no bearing on the present case. The civil bill decree therein, as well as the foreclosure decree in *Pugh* v. *Heath* (2), which the decision followed, was given *before* the period fixed by the Statute of Limitations had run its course, and is no authority as to the effect of a judgment obtained *after* such period has expired.

The first question reserved for our decision—whether the plaintiffs' claim is barred by the Statute of Limitations—seems, therefore, to depend entirely upon whether the defendants, who are the successors in title of the defendants in the action of 1890 are estopped by the proceedings and judgment therein from denying that at the date of the latter, the tithe rentcharge mentioned in the civil bill was a good subsisting charge.

The proverbially odious character of an estoppel is illustrated by the two questions in this case, when taken together, for the second turns also on the doctrine of estoppel. In 1896 the plaintiffs issued a civil bill against the persons who were then the successors in title to the defendants in the

(1) 24 L. R. Ir. 40. (2) 7 App. Cas. 235.

Appeal. 1900. IRISH LAND COMMISSION v. RYAN. Holmes, L.J.

former action and the predecessors in title to the present defendants, for the recovery of £10 6*s.* 11*d.*, arrears of tithe rentcharge payable in respect of the lands of Gortnaboley, up to the 1st November, 1896; and upon the defendants appearing and resisting the demand, the plaintiffs' bill was dismissed on the merits. The second question for our consideration is whether this dismiss, being admittedly the judgment of a tribunal having jurisdiction in the matter, estops the plaintiffs from recovering on the civil bill now before the Court.

It would be a somewhat curious result of a legal doctrine if we were obliged to hold that the judgment obtained by default can be relied on to show that the lands were subject to tithe rentcharge in 1890, and that the subsequent decree, given after full discussion, cannot be used to show that they were not so subject in 1896. There is little doubt that the defence then raised and adjudicated upon was that of the Statute of Limitations; and although this is not set forth in the case, still, if the fact was proved at the hearing, the case could be amended on the certificate of Mr. Justice Johnson, pursuant to the 37th section of 27 & 28 Vict. c. 99. Mr. Ronan, however, has argued strenuously against any amendment of this kind, on the grounds that the record cannot be supplemented by parol evidence. Notwithstanding some expressions to the contrary by Palles, C.B., in giving the judgment appealed from, and notwithstanding that the estoppel in *Flitters* v. *Allfrey* (1) seems to have been proved by oral testimony, I am disposed to think that Mr. Ronan is right. In a Court where the issues knit between the parties do not form part of the record, they may, I think, be proved orally in subsequent proceedings between the same parties, and may be relied on as evidence in favour of or against one or other; but I am of opinion that if so proved, they would not operate as an estoppel. There is wanting the essential quality to constitute an estoppel by matter of record; and I do not see how they could be used to support an estoppel *in pais*. I am, therefore, prepared to hold that the second question ought to be answered in the negative.

(1) L. R. 10 C. P. 29.

I now return to the first, which has never, as far as I can discover, arisen in any reported case, and the determination of which in favour of the plaintiffs may lead to unexpected and far-reaching consequences. That the judgment creates an estoppel, to a certain extent, there is no doubt. The defendants can never afterwards deny that they owed at its date the sum of £9 11s. to the plaintiffs; but beyond this the judgment itself shows nothing. What is required by the plaintiffs is either an adjudication or something tantamount to an adjudication, that there was then a tithe rentcharge payable in respect of the lands of Gortnaboley. This must be ascertained from the rest of the record, and the only other document is the writ of summons.

Now a writ of summons, as its name implies, is only a command to the defendant to enter an appearance in the action with an intimation that if he fails to do so, the plaintiff may proceed and judgment be given in his absence. The rules of Court prescribe what it is to contain; and in examining these requirements I premise that I confine myself to such of the rules in force in 1890 as are material for my purpose. It will be observed that I speak in the past tense; as our present rules are not quite the same. The writ of summons must have been endorsed with a statement of the nature of the claim made; and where it was for a debt or liquidated demand only, the endorsement ought also to have stated the amount claimed for debt or in respect of such demand (1). It was not essential, however, to set forth in the endorsement the precise ground of complaint (2): and under the penalty of the loss of costs the use of any more prolix or other forms than those given in the appendix was forbidden (3).

There was no form referring to rentcharge; but that for rent was in the words following:—"The plaintiff's claim is £ : : for arrears of rent." In certain classes of actions, including a class that embraced an action for tithe rentcharge, the writ of summons might have been specially endorsed with the particulars of the amount sought to be recovered after

(1) Order I., Rule 1; Order II., Rule 4.
(2) Order II., Rule 1.
(3) Order I., Rule 1.

Appeal. 1900. IRISH LAND COMMISSION *v.* RYAN. Holmes, L.J.

giving credit for any payment or set off (1); but this was wholly optional, and had only the effect of giving the plaintiff in some events a more summary or speedy mode of procedure. The endorsement on the writ, whether special or otherwise, was not in itself a pleading; and unless the defendant stated when entering his appearance that he did not require a statement of complaint, the plaintiff was bound to deliver a statement of claim setting forth the facts on which he meant to rely to support his cause of action. When, however, the writ was specially endorsed, it was sufficient for the plaintiff to deliver, as his statement of claim, a notice to the effect that his claim was that which appeared by the endorsement on the writ, which thereupon became a pleading (2). Until after the statement of claim or a notice in lieu thereof was delivered, no issue could be said to have arisen in the action; and although it was provided that every allegation of fact in a pleading, if not denied or stated to be not admitted in the pleading of the opposite party, was to be taken to be admitted (3), there was no similar provision regarding allegations in the endorsement on the writ unless and until it became a pleading.

Let me now, in the light of the foregoing observations, examine the endorsement on the plaintiffs' writ of summons. It is a special endorsement setting forth particulars of the tithe rentcharge alleged to be due, and of the lands out of which it issues, and avers that the defendants have such an estate and interest in the lands as render them liable to pay the plaintiffs the tithe rentcharge sought to be recovered. The lands are only described by reference to the parish, but I assume that they are the lands of Gortnaboley mentioned in the civil bill. I also assume that if the facts averred in the endorsement had been set forth in a statement of claim and had been admitted in subsequent pleadings, or established either by proof at the trial, or by judgment by default, the defendants would have been estopped from denying in subsequent litigation that the lands were not liable to tithe rentcharge at the date of the judgment. But how can an estoppel be based on averments which were not a necessary part

(1) Order II., Rule 3. (2) Order XX., Rule 2.
(3) Order XVIII., Rule 10.

of the record, and were neither proved nor admitted? If a writ of summons had been endorsed with a claim for £50 for arrears of rent and judgment entered in default of appearance, could the record be used as an estoppel in a subsequent action between the same parties for the recovery of rent alleged to be due under a specific lease for specific lands? Surely not. But suppose that the endorsement went on to state that the lands were held under a lease that had no existence at a rent greater than what had been agreed to and paid, would these averments after judgment by default bind the defendant in a future suit? There is one argument that seems to me to show conclusively that they would not. The plaintiff himself would not have been bound by them in the very action in which they had been made. He might in his statement of claim have set forth a different tenure, have relied on a different title, and have claimed a different rent. Provided his claim continued to be for rent, and for no greater sum than that endorsed on the writ, he might have altered all the other particulars. In my opinion an unnecessary averment in a record that is neither pleaded to nor admitted cannot be used as an estoppel. Therefore, in the present case I hold that the judgment can be relied on only for the purpose of showing that the plaintiffs recovered from the defendants a certain sum on account of tithe rentcharge; but that all the other particulars contained in the endorsement are still open and may now be traversed or confessed and avoided by the defendants.

In saying this, I do not mean to convey that there may not under certain circumstances be an identification of something mentioned in the record by parol evidence. When an estoppel by record is relied on, it is, I think, allowable to identify such physical objects as lands, a watercourse, or a document referred to, but imperfectly described therein. I doubt, however, whether incorporeal things like a rent or a rentcharge are within this principle; and at all events it cannot be applied in the present case. The only way in which the plaintiffs could prove identity would be by showing that the Gortnaboley tithe rentcharge was the only tithe rentcharge then payable to them by the defendants; but the plaintiffs could not establish this, as it was not payable in point of fact.

Appeal. 1900.

IRISH LAND COMMISSION v. RYAN.

Holmes, L.J.

Thus far I have dealt with the question from a somewhat technical point of view upon considerations arising under the Rules of Court in force in 1890. I am disposed to think, however, that I should have come to the same conclusion if the judgment in default of appearance had been obtained on a writ of summons and plaint under the Common Law Procedure Act, 1853, or on a writ of summons with a statement of claim endorsed under the present Rules. This case may arise hereafter, and I do not now intend to say my last word upon it, but it would not be right to pass it over altogether.

It is a principle in every system of jurisprudence that there should be finality in litigation. A judgment not appealed from binds the parties and privies for all time by what appears upon its face; and if it can be shown that, in the course of the action that resulted in the judgment, a certain definite and material issue not set forth in the judgment itself was raised by the parties and determined judicially or by consent, it would be contrary to public policy to allow the same parties to re-agitate the same matter in subsequent legal proceedings. Estoppel by matter of record rests on this principle, and although it may be said in one sense to exclude the truth, it is essentially just and righteous. But to infer by a process of legal fiction that an issue had been raised and decided between two parties, one of whom had never taken any part in the litigation, seems to me to be opposed to elementary notions of justice; and I am glad to say that I can find no authority for it in any reported case.

No branch of our law has been more frequently and fully illustrated by judicial exposition than the doctrine of estoppel; and the point to which attention has been directed in case after case, is whether the actual matter relied on by way of estoppel had or had not been already raised and determined. Lord Ellenborough in his great judgment in *Outram* v. *Morewood* (1), refers to a case of *Evelyn* v. *Harris* tried before Lord Mansfield. It was a second action for obstructing a watercourse; and a verdict for the plaintiff in another action brought against the defendant for obstruction to the same watercourse was given in evidence; but Lord

(1) 3 East, 346.

Mansfield held that it was not conclusive. Lord Ellenborough said that his predecessor had ruled "very properly," because no issue was taken in the first action on any precise point, which is necessary to constitute an estoppel thereupon in the second action. I do not propose to examine the innumerable cases on this point. *Howlett* v. *Tarte* (1), referred to by my brother FitzGibbon, is a very valuable authority, and I agree with him that it governs the present case. I may also refer to *Carter* v. *James* (2). There in an action on a bond, the defendant pleaded an usurious agreement made between the plaintiff and himself, and averred that the bond was given in pursuance of such agreement. The plaintiff traversed the latter allegation—that the bond was given in pursuance of the agreement—and issue being joined thereon, the jury found for the defendant. Another action was then brought to recover under a covenant in a mortgage deed the same debt which had been secured by the bond; and the defendant relied on the previous verdict and judgment as an estoppel. It was held that he could not do so, inasmuch as the existence of an usurious agreement was not directly in issue in the previous action, but only the question whether the bond was given in pursuance of the alleged agreement. The peculiarity of this decision is that it was stated by the Court that the plaintiff must have been taken to have admitted the usurious agreement for the purpose of the first action. I am aware that this case has been criticised on the ground that plaintiff's pleading over had amounted in law to an admission on the record of the first part of the allegation, but this does not affect its authority upon the necessity of having an issue raised between the parties and either pleaded to or admitted.

Some text books refer to two cases as authorities that there may be an estoppel where the judgment is by default: *The Bellcairn* (3) and *The South American Company* (4). But it will be found that both these cases were judgments by consent at the trial after pleadings and joinder of issue. In the latter, Vaughan Williams, J., says that "it has always been the law

(1) 10 C. B. (N. S.) 813.
(2) 13 M. & W. 137.
(3) 10 Prob. Div. 161.
(4) [1895] 1 Ch. 37.

Appeal. 1900. IRISH LAND COMMISSION *v.* RYAN. Holmes, L.J.

that a judgment by consent or by default raises an estoppel just in the same way as a judgment after the Court has exercised a judicial discretion in the matter." In this I agree, and if after pleadings and joinder of issue, one or other party makes default and a judgment follows, the case ought to be dealt with just as if it had been decided by the Court.

But the proposition which I desire to keep open is whether a judgment obtained in default of appearance is under any circumstances conclusive of anything beyond what appears on the face of the judgment itself. For these reasons, I am of opinion that the first question ought to be answered in the affirmative.

Solicitor for the plaintiffs: *W. Alexander.*
Solicitor for the defendants: *S. J. Ryan.*

G. Y. D.

Appeal. 1899. Feb. 22. April 20.

MALONE *v.* ROSS (1).

Sheriff—Fees and expenses—Interpleader—Expense of keeping live stock—Costs—Liability of successful claimant.

An interpleader order directed the sheriff to sell certain live stock seized under a writ of *fi. fa.* unless security were given by the claimants. The claimants failed to give security, and the sheriff sold the live stock, and paid the proceeds into Court. The interpleader issues were decided in favour of the claimants:—

Held, that the sheriff was entitled to be paid out of the fund in Court all costs of the interpleader order, and also all proper expenses of agisting the live stock, but not his fees for executing the writ.

APPEAL from the order of the Queen's Bench Division, dated the 27th January, 1899, making no rule upon a motion on behalf of the sheriff that a sum of £24 8*s.* 6*d.* lodged in Court pursuant to an interpleader order should be paid out to him in satisfaction of the sum of £23 18*s.* 2*d.* due for livery of one horse, two colts,

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER, and HOLMES, L.JJ.

and three cows seized under a writ of *fieri facias* issued in the action and for auctioneer's fees, poundage, warrant, mileage, and bailiff's fees connected with the seizure and sale, and for costs of the interpleader.

On May 2, 1895, the writ of *fieri facias* was issued and lodged with the sheriff, marked for the sum of £150 debt, and £91 17*s.* 8*d.* costs, making together the sum of £241 17*s.* 8*d.* Under this writ, the sheriff on May 21, 1895, seized one horse, two colts, and three cows, which he believed belonged to the defendant. Thomas Dagg claimed two of the cows so seized, and George Thompson claimed the horse, two colts, and one cow, the residue of the property seized. The sheriff thereupon put the said live stock at livery.

On June 1, 1895, the sheriff obtained an interpleader order, whereby amongst other things it was ordered that the sheriff should be at liberty to deliver up the said goods and chattels to the said claimants respectively upon receiving satisfactory security therefor within ten days from the date of the order, and in default that the sheriff should be at liberty to sell the said goods and chattels, and to bring the proceeds thereof into Court to abide further order, and that the question of costs and expenses of all parties should remain over until the return of the issues thereby directed to be tried.

Not having received satisfactory security within the time limited by the said order, the sheriff sold the said goods and chattels by public auction on June 17, 1895, and realized by such sale the sum of £24 8*s.* 6*d.*, which sum he lodged in Court. The sheriff had to pay £15 8*s.* for livery and keep of the horse, colts, and cows while under seizure. This sum was paid by the sheriff under compulsion, the keepers refusing to deliver him back the stock until the amount was paid. The sheriff also claimed £3 7*s.* for auctioneer's fees, poundage, warrant, mileage and bailiff's fees in respect of the said execution, making in all the sum of £18 15*s.* He also claimed the sum of £5 3*s.* 2*d.* as and for his costs connected with the interpleader, making the total amount due to him £23 18*s.* 2*d.*, and he claimed that the sum of £24 8*s.* 6*d.* so paid into Court as aforesaid, should be paid out to him in satisfaction of the said sum of £23 18*s.* 2*d.* and of the costs of the application. The application was opposed by the persons who claimed the goods

Appeal. 1899.

MALONE v. ROSS.

taken in execution and who succeeded in the trial of the issues directed by the interpleader order. It was shown by affidavit in what proportions the sum in Court represented the respective property of the claimants. It appeared that the execution creditor had left the country insolvent.

The Queen's Bench Division made no rule on the motion without prejudice to the right of the sheriff to make such application as he might be advised for payment of the sum claimed by him from the execution creditor, and directed him to pay £4 4*s.* costs of the motion to each of the claimants.

From this order the sheriff appealed.

Charles Murphy, for the appellant.

Jackson, for Thompson, and

D. Kehoe, for Dagg, *contra.*

[They cited *Yates* v. *Meehan* (1), *Taaffe* v. *Tyrrell* (2), *Dabbs* v. *Humphrey* (3), *Bland* v. *Delano* (4), *Smith* v. *Darlow* (5), *Todd* v. *M'Keevir* (6).]

Cur. adv. vult.

April 20.

HOLMES, L.J. (who delivered the judgment of the Court) :—

The incidence of the costs and expenses of the sheriff, who has obtained an interpleader order, is usually settled on an application made by the litigant who succeeds in the issue. Although the trial in this case took place in the summer of 1895, and the proceeds of the stock seized have been lodged in Court for nearly three years, the successful claimants, for some reason that is left wholly unexplained, have never asked to have this fund disposed of. In these circumstances, the sheriff himself instituted a motion to be paid thereout certain sums to which he claimed to be entitled. This was met by an affidavit of George Thompson, one of the claimants, imputing to the sheriff every possible kind of misconduct

(1) 11 Ir. C. L. R. App. i.
(2) 14 Ir. C. L. R. App. xxvii.
(3) 3 Dow. 377.
(4) 6 Dow. 293.
(5) 26 Ch. D. 605.
(6) [1895] 2 I. R. 400.

in connexion with the levy, detention, and sale. These sweeping charges have been, in my opinion, satisfactorily rebutted. If there had been any foundation for them, Thompson would have sought redress, or at least applied for payment of the money in Court long ago; and the mode in which they have been now brought forward has all the marks of a reckless afterthought.

The apparent extravagance of the sheriff's demands, is calculated to cast discredit upon his application. At the same time, it is right to say that a perusal of his affidavit has shown that he is not without excuse in claiming the sum of £15 8*s.* for the agistment of the animals. The livery keepers refused to deliver them up to be sold until this amount was paid, and the sheriff was obliged to pay it under protest. This would not of course entitle him to recover from another an excessive demand; but it relieves him from the imputation of personal extortion.

The two claims on the fund in Court, with which this appeal is conversant are—1, the cost of agisting the animals seized, from the day of seizure to the time of sale—a period, it is said, of twenty-eight days; and 2, the costs of the interpleader order.

Although the 6th section of the Interpleader Act, which enables a sheriff to obtain the order, gives the Court apparently ample jurisdiction as to costs, the sheriff was for a long time treated in this respect in a somewhat niggardly spirit. The dignity of his office was once thought a sufficient recompense for large pecuniary loss; and even the statutory fees provided for the under-sheriff were often far from remunerative. I am glad that both the makers of law and its administrators have at length begun to recognise that modern sheriffs are generally poor men, to whom the dignity is a burden; and in the last scale of fees as well as in recent decisions, they have been more liberally dealt with. There was, however, one class of expense to which, as a general rule, they have been held entitled since the passing of the Interpleader Act. An order to interplead is never made except in the presence of the judgment creditor and the claimant. If the latter does not attend, his claim is barred. If the former does not attend, the sheriff is ordered to withdraw from possession. In neither case is there any additional expense for keeping the goods. But where an order to interplead is made, the claimant is at

Appeal. 1899.

MALONE v. ROSS.

Holmes, L.J.

liberty to elect between having the goods sold at once, or getting possession of them on giving security. For an obvious reason, he generally takes the second alternative, and therefore the order is so drawn up as to give him a certain period—usually, ten days—to procure the necessary security. It often happens that he does not do so until the last moment; and, occasionally, he fails to do so altogether, in which case the sheriff sells under the order of the Court. The question naturally arises, Who pays for keeping the goods from the date of the order—in this case the 1st June—till security is completed or sale, in this case the 17th June? Surely, the reasonable answer is the claimant, for whose benefit and at whose request, the goods are kept. This would be quite irrespective of the result of the interpleader suit. The claimant entitled to cattle causes the Court, which would otherwise direct them to be sold at once, to order the sheriff to retain them for a certain period for the claimant's benefit. Why the sheriff should, in such a case, pay the costs of their agistment in the interval, I am unable to see. At all events I know the practice of the Divisional Courts has been to give the sheriff the costs of agistment out of the proceeds of the sale, if the fund is brought into Court, and if not against the claimant, even where he succeeds. The latter may be entitled to have such costs included in the costs awarded him against the judgment creditor; but this does not follow as a matter of course. I may also add that if the judgment creditor succeeds, the sheriff retains the amount out of the proceeds as part of the costs of the levy; and if the judgment debt is not fully discharged by the amount realised, the judgment creditor would, in most cases, be entitled to have an order for the costs so deducted against the claimant. *Taaffe* v. *Tyrrell* (1) was not a peculiar case. It was the very usual case of a sheriff's interpleader issue in which the claimant succeeded, and all the claimant's costs of the proceedings were given against the judgment creditor; but the claimant was ordered to pay the sheriff for the maintenance of the live stock seized. Lefroy, C.J., said, "the plaintiff might have obtained possession of them from the sheriff upon giving security, had he thought

(1) 14 Ir. C. L. R. App. xxvii.

fit so to do, and might have taken upon himself the feeding and care of them. The sheriff, however, since no security was given or offered, was bound in the performance of his duty to keep the horses, and preserve them alive, and therefore he is entitled to be reimbursed the expenses which he necessarily incurred in performing his duty in that way . . . . who then is to pay them? Clearly the party who might, if he had pleased, have kept the horses in his own care and at his own expense, but who has foregone that opportunity, and has thrown upon the sheriff the obligation of keeping them when, in consequence of the plaintiff's claim he was prevented selling them at once." These words state the rule which, as far as I am aware, has been since acted on, so that even before the decision in *Todd* v. *M'Keevir* (1), I should have had no hesitation in holding that the sheriff is entitled to be paid a reasonable sum for the agistment of the animals for seventeen days out of the money in Court.

But if there were any doubt about it, *Todd* v. *M'Keevir* (1) has removed it as far as this Court is concerned. There the actual question decided was the sheriff's right to be paid the costs of obtaining the interpleader order; but the principle laid down was of wider application. After the Interpleader Act, the Courts of Queen's Bench and Common Pleas held that the sheriff was not, under any circumstances, entitled to these costs, but the Court of Exchequer acted on the opposite rule. These conflicting opinions arose from the different views taken by the respective Courts of the position of the sheriff under the statute. If it was only intended to give him the means of freeing himself from liability, he ought to pay for the privilege out of own pocket. But if it placed him in the position of a person who, before the Act, would have been entitled to maintain an interpleader suit, he ought to have the same right to costs, namely, to be paid his expenses out of the fund or property, no matter who might be ultimately found the owner of it. After the Judicature Act, the Exchequer Division determined to follow the rule acted on in the other Divisions; and *Todd* v. *M'Keevir* (1) was an appeal brought to settle the question. This Court upheld the practice of the

(1) [1895] 2 I. R. 400.

Appeal. 1899.

MALONE v. ROSS.

Holmes, L.J.

Exchequer upon the principle I have mentioned. Indeed, the decision could not have been arrived at on any other principle. The judgment creditor had in that case succeeded in the issue; and whatever ground there might be to make an unsuccessful claimant pay the costs of the interpleader order, there is, as a rule, no such personal equity against the judgment creditor, who rarely interferes beyond telling the sheriff to find out for himself what his duty is, and to do it. This Court, however, decided that the interpleader order (which is only given when a proper case is made for it) placed the sheriff in the position of a plaintiff who, in an interpleader suit, had been held entitled to interplead, and that therefore he ought to be indemnified in the first instance by the property, or by the person who established his right to it, against his costs of the order. The same principle would apply to all costs incurred by him in reference to the subject-matter of the interpleader, either before or after the order. This case is therefore a clear authority that the sheriff is entitled to be paid out of the fund in Court, not only the costs of the interpleader order, but also all the expenses of agistment, even if there were not other good grounds for allowing, at least, a large portion of the latter.

At the close of the argument in the present case the Court intimated that it considered the agistment expenses ought not to exceed £8—a sum which is much less than the sheriff actually paid; but he must suffer for his want of foresight in not providing against being overcharged. The sum usually given for an interpleader motion moved by a solicitor is two guineas; and if four guineas, the costs of appeal, be added, the sheriff would be entitled to £14 6*s.* altogether. He ought to bear his own costs in the Divisional Court in consequence of the excessive character of the demand.

Under ordinary circumstances the claimants would be entitled to recover from the judgment creditor the costs of the order paid to the sheriff out of their money; but in the present case the interpleader issue was decided on consent, one of the terms of which was that the proceedings should be without costs.

Per Curiam.—Discharge the order appealed from, and in lieu thereof direct the Accountant-General out of the fund in Court stand-

ing to the credit of the action to pay to the sheriff for his demand and costs £14 6*s.*, to Thomas Dagg, £2 2*s.*, and to George Thompson £8 0*s.* 6*d.*

Solicitor for the sheriff: *Kirkpatrick.*
Solicitor for Thompson: *Baillie.*
Solicitor for Dagg: *Findlater & Co.*

G. Y. D.

IN RE BORROWES AND THE LOCAL GOVERNMENT (IRELAND) ACT, 1898, SECT. 5 (1).

Appeal. 1900. Feb. 20.

Malicious injury to property—Compensation—Breaking into premises where furniture was stored—Malicious Damage Act, 1861 (24 & 25 *Vict. c.* 97), *—Local Government (Ireland) Act*, 1898 (61 & 62 *Vict. c.* 37) *sect.* 5.

B. was the owner of Gilltown House and demesne in the county of Kildare. The house had been burnt down except the kitchen, where some furniture, including a picture and two mirrors, was stored. M., a military chaplain at the Curragh Camp, obtained leave to bring some of the band boys stationed at the Curragh to the demesne for a day's holiday. Some of the boys strolled over to the building, and from curiosity to see what was in it, smashed open the doors and windows, and five of them entered. One of them in struggling to get out broke the two mirrors:—

Held, that the acts were malicious, and were punishable as a crime under the Malicious Damage Act, 1861, and therefore the applicant was entitled to the full amount of compensation claimed.

CASE STATED for the opinion of the Court of Appeal by Johnson, J., at the Summer Assizes at Naas.

The case came before Johnson, J., on appeal by Major Burrowes from a decree of the County Court Judge for the County of Kildare, dated 30th May, 1899, whereby the County Court Judge found that the applicant was entitled to the sum of

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER, and HOLMES, L.JJ.

Appeal. 1900. *In re* BORROWES.

£15 3*s.* 4*d.* as compensation for damage to property under the circumstances following:—

Gilltown House and demesne were the property of Major Borrowes, who resided there until 1896, when the house (excepting the kitchen and some offices comunicating therewith) was destroyed by fire. Two large gilt-framed mirrors, each measuring 12 feet by 5 feet 6 inches, and a large picture were saved from the fire, and stored in the kitchen. The kitchen had nine windows and four doors. The windows were wooden frames glazed with fluted glass, and fitted with wooden shutters inside. One of the doors opened in front, one in rere, and two communicated internally with the house. A table 3 feet high by 2½ feet wide was fixed (under some of the windows) to each of two of the kitchen walls, built at right angles to each other. The two mirrors (one in front of the other) were rested on edge on the kitchen floor, leaning backwards against one of the said tables, and covered with a sheet to keep off dust. The picture was rested on edge on the kitchen floor, leaning backwards against the other of said tables. Several heavy iron window-sash weights collected after the fire were piled in a heap in the yard at the rere of the kitchen.

Major Borrowes, on a written application by the Rev. Mr. M'Pherson, miltary chaplain to the Forces at the Curragh Camp, permitted Mr. M'Pherson to give the band-boys of regiments stationed at the Curragh a day's outing for recreation at Gilltown demesne, and on the 24th April, 1899, under said permission, Mr. M'Pherson took a party of the said band boys whose ages varied from 14½ to 17½ years to Gilltown demesne. In the afternoon several of said boys went unobserved to the ruins of Gilltown house. At that time the kitchen windows were shut and securely fastened, and the shutters bolted. The kitchen doors were all locked, and firmly secured. The two mirrors (covered with the sheet) and the picture were respectively in the positions stated aforesaid, and uninjured. One of the bigger boys desiring to see what was in the kitchen, and not being able to get in by any of the doors, took one of the iron window-sash weights from the heap in the yard, and with it smashed in one of the kitchen windows with its frame and shutters, and climbed through the broken window into the kitchen, followed by four

of his companions. They remained in the kitchen about a quarter-of-an-hour looking about them, and while they were there eleven of their companions, who were outside, possessed themselves of five more of the iron sash-weights, and with them smashed the rest of the windows, which were all broken from the outside, and pelted the boys inside with stones.

Paragraph 13 of the case stated:—Four of the boys who had got into the kitchen as aforesaid, got out through the broken windows without doing further injury. The fifth boy, who had got into the kitchen, as aforesaid, in endeavouring to mount on the table against which the mirrors were leaning, in order to reach and get out of the kitchen through one of the broken windows, climbed over the mirrors, and while so doing unintentionally entangled one of his feet in the covering sheet of the mirrors, and recklessly and violently kicked one to release his foot, and knocked down both mirrors, which were shattered into fragments on the floor, and he then got out through a broken window.

Next day, the 25th April, complaint was made of the damage. The injuries to the window-frames, shutters, and doors amounted in all to £14 10*s*., and the injury to the mirrors amounted to £30 each, making, in all, £74 10*s*. On the hearing of the appeal by the Judge of Assize, the boy who kicked down and broke the mirrors, as aforesaid, was produced as a witness by the respondents, and being informed by the Judge how he might be incriminated by his evidence, and that he was not bound to answer any question which might tend to criminate him, stated that he had come to tell what happened, and would do so, and he then proved the facts.

Counsel for Major Borrowes contended that the amount of the order and decree of the County Court Judge ought to be enlarged to the sum of £74 10*s*. Counsel for the respondents contended that Major Burrowes was not entitled in law to compensation by the respondents for any of the injuries, and that his application ought to be dismissed on the merits.

Paragraph 19 stated:—The Judge of Assize found in fact—

1. That said boys broke into said kitchen from motives of curiosity to see what was there.

Appeal. 1900. *In re* BORROWES.

2. That said boys wilfully and intentionally broke said windows, window-frames, and shutters, and injured said doors without any lawful justification or excuse, and their acts were in law unlawful and malicious acts and crimes, punishable on indictment, under 24 & 25 Vict. c. 97, s. 52.

3. That said fifth boy, mentioned in paragraph 13, aforesaid, knew that said mirrors were covered by said sheets, and wilfully and intentionally climbed over the mirrors, reckless whether in doing so he should injure the mirrors or not; that he unintentionally caught his foot in the sheets; that without attempting to free his foot gently without injuring the mirrors, he wilfully and intentionally kicked out with reckless violence to free his foot, knowing that the probable result in his struggle would be to injure the mirrors, and not caring whether he injured them or not; that his said acts in climbing over the mirrors and throwing them down, as aforesaid, were without any lawful justification or excuse, and were in law unlawful and malicious acts and crimes, punishable on indictment, under 24 & 25 Vict. c. 97. s. 52.

4. That it was the duty of the Rev. Mr. M'Pherson to take reasonable care that proper and reasonable supervision and control were exercised over said boys while they were in Gilltown demesne, where he had brought them under the permission aforesaid, and that owing to neglect of said duty said boys were left at large, and free to commit the injuries complained of.

Notwithstanding these findings the Judge of Assize decided that in the circumstances aforesaid said application for compensation by Major Borrowes was not as to any part thereof within the provisions of the Local Government (Ireland) Act, 1898, or any Act incorporated therewith, and that no obligation, statutable or otherwise, was in law imposed upon the respondents, or either of them, to provide compensation for Major Borrowes at the expense of the ratepayers for any of said injuries to his property (even though unlawful and malicious within 24 & 25 Vict. c. 97), by mischievous boys who were brought on his land with his permission and sanction, for lawful recreation, but by neglect of those in charge of them left at large, and thus free to commit the injuries complained of.

The Judge of Assize reversed the order and decree of the County Court Judge, and dismissed Major Borrowes' application for compensation on the merits, with costs in the said County Court and of the hearing at the assizes, without prejudice to any other proceeding Major Borrowes might be advised to take.

The question for the Court was:—Whether said order of reversal and dismissal of Johnson, J., was erroneous, and, if so, what ought to be done in the premises?

The Solicitor-General (*Wright, Q.C.*), *Wakely, Q.C.*, and *Dudley White*, for Major Borrowes:—

The applicant is entitled to the full amount of compensation claimed, as the entire damage was caused by malicious acts. As to what amounts to malicious injury, see *Reg.* v. *Pembliton* (1); *Reg.* v. *Martin* (2). If there is a reckless disregard as to whether an act might injure or not, that is a malicious act: *Reg.* v. *Welch* (3). *Reg.* v. *Faulkner* (4) does not apply: in that case there was an indictment for arson.

Ronan, Q.C., Falconer, Q.C., and *J. P. Brett*, for the Kildare County Council:—

The test for liability to compensation is whether the case would come under the Grand Jury Acts. We submit it would not; we say that the act was not done maliciously, or with intent to injure the property. When the five boys went down to and entered the building, it was merely to see what was inside—a mere matter of curiosity which repels any idea of an organised malicious attack.

The proviso at the end of section 5 (1) of the Local Government Act, limits the operation of the section.

LORD ASHBOURNE, C.:—

As we are all agreed, we do not think it would be fair to put the parties to the expense of coming here to-morrow, and so we shall not postpone our judgment. The case is brought under the 5th section of the Local Government Act, and it came first before

(1) L. R. 2 C. C. 119.
(2) 8 Q. B. D. 54.
(3) 1 Q. B. D. 23.
(4) I. R. 11 C. L. 8.

Appeal. 1900. *In re* Borrowes. Lord Ashbourne, C.

the County Court Judge for Kildare upon the 30th May last, claiming compensation for damages to some property in Gilltown House, the property of Major Borrowes. Gilltown House was burnt down in 1896, except the kitchen, in which some property was stored, but Major Borrowes continued to live in the neighbourhood. It appears that in the spring of 1899 a Mr. M'Pherson, who was a military chaplain at the Curragh, obtained leave to bring some of the band boys at the Curragh Camp over to Gilltown demesne for a day's outing. Some of the boys availed themselves of the opportunity to break into the kitchen, where they smashed a picture and two mirrors, which had been stored there. The boys did the damage by getting in, and one of them through his struggles in getting out of the kitchen damaged the mirrors, and the glass was broken. In respect of all this damage done to his property, Major Borrowes instituted proceedings to recover damages for malicious injury before the County Court Judge. The 5th section of the Local Government Act, under which the claim was brought, has developed the 135th section of the Grand Jury Act, and widened it so as to include all kinds of real and personal property. When the case came before the County Court Judge he awarded, with respect to the minor class of damage a sum of £15 3*s.* 4*d.*, together with costs and expenses. That was a mitigated allowance for the damage done to the window frames, shutters, and doors, but it did not include anything for the damage to the mirrors and the picture, and Major Borrowes appealed. There was no cross appeal, but no technical objection was raised upon that ground, and the case proceeded on the basis that each side could make out and argue his own case.

Johnson, J., heard the case very fully, and embodied the evidence given before him in a case stated; and the matter is in substance concluded by the findings in the case stated. He has found, as a matter of fact, that these boys wilfully and intentionally broke the said windows, window frames, and shutters, and injured the said doors. That the said acts were without any lawful justification or excuse, and were in law unlawful and malicious acts and crimes, punishable on indictment under 24 & 25 Vict. c. 97, s. 52.

The same observation applies to the damage to the mirrors. The learned Judge has found as a fact at par. 19 (*c*)—"The fifth boy mentioned in paragraph 13 aforesaid knew that the said mirrors were covered by the said sheets, and wilfully and intentionally climbed over the mirrors, reckless whether in doing so he should injure the mirrors or not; that he unintentionally caught his foot in the sheets; that, without attempting to free his foot gently without injuring the mirrors, he wilfully and intentionally kicked out with reckless violence to free his foot, knowing that the probable result in his struggle would be to injure the mirrors, and not caring whether he injured them or not; that his said acts in climbing over the mirrors, and throwing them down as aforesaid, were without any lawful justification or excuse, and were in law unlawful and malicious acts and crimes, punishable on indictment, under the 24 & 25 Vict. c. 97, s. 52."

Mr. Ronan, with much adroitness, tried in his argument to confine the case to the facts stated in paragraph 13, without taking into account the findings in fact by the learned Judge of Assize, as set forth in paragraph 19. There in that latter paragraph is a finding in fact that the acts were wanton and malicious, and were punishable as crimes within 24 & 25 Vict. c. 97, sect. 52. I can see no escape from the clear and direct finding, which practically carries the whole case for the claimant. I am, therefore, of opinion that we should answer the question submitted to the Court by stating that the order of reversal and dismissal of Johnson, J., was erroneous, and that the appellant is entitled to the full amount of compensation claimed for the entire damage, namely, £74 10*s*.

FITZ GIBBON, L. J.:—

Upon one part of this case, which seems to have weighed with the County Court Judge and with Johnson, J., I wish to say a few words. The matter was dealt with as a freak of some "boys," who should scarcely be held accountable for their conduct. But the fact was that they were members of regimental bands from the Curragh Camp; that the youngest of them was 14½ years old; and that some of them were young men up to 17½ years. Johnson, J., has found that the Rev. Mr. M'Pherson did not

Appeal. 1900. *In re* Borrowes. Fitz Gibbon, L.J.

exercise proper control over them, but in my opinion he was not to blame. These so-called "boys" were old enough to look after themselves. I decline to assume that doing such mischief as they did was the natural consequence of giving them a holiday, or that the law of animals *feræ naturæ* is to be applied to them, or to the Rev. Mr. M'Pherson as their keeper. They were of an age at which the law attributes malice to them, just as it does in the case of adults.

It is really beside the question to attempt to make any distinction between what was done by the main body who began the mischief outside the building, and the five who got inside. Johnson, J., finds that the boys broke in "from motives of curiosity." A motive of curiosity might negative malice, but he finds malice, for he says that the acts were unlawful and malicious acts, and crimes. They were acts of great violence. The party smashed the windows, window-frames, shutters, and doors, and broke into the house. The circumstances stated in the case would afford coercive evidence of malice in fact, on an indictment for malicious trespass. I cannot follow the argument of Mr. Ronan as to the acts of the boy who broke the mirrors inside. Mr. Ronan relied on paragraph 13 only, which states that this boy, in trying to get out, unintentionally entangled his foot in the covering sheet of the mirrors. But paragraph 13 gives only an outline of what happened; the facts are more fully set out in paragraph 19 (*c*). If a burglar has broken into a house, his getting out again is not a lawful act; it is unlawful. The learned Judge finds that the breaking of the mirrors was malicious, almost in the words of the judgments in *Reg.* v. *Pembliton* (1). He finds that the boy's freeing his foot was not done gently and without intention to injure, but by wilfully and intentionally kicking out with reckless violence, knowing that the probable result would be to injure the mirrors, and not caring whether he injured them or not. He could not have more completely stated the case out of Court, upon every defence except that of "*volenti non fit injuria.*" If it had been tried by a jury, on an indictment for unlawful and malicious injury to property, and if the jury had expressed their view with

(1) L. R. 2 C. C. 119.

regard to the facts in the words of this case as to the breaking of the mirrors, it would be a mere matter of form whether the Judge should tell them—"Upon these facts you may find malice," or "These facts are evidence of malice, on which you ought to convict."

The last point raised was that Major Borrowes was disqualified from obtaining compensation, because he allowed the boys to be brought to his place, and "*volenti non fit injuria.*" If the boys had done this mischief anywhere else, they would have been liable criminally, and their conduct can not be less criminal because, being visitors, they damaged the property of their host. Their being visitors only bound them to behave better than usual. This application of the doctrine *volenti non fit injuria* goes even further than the attempt to apply it under the Employers' Liability Act to a workman who goes on working with machinery which he knows to be defective through no fault of his.

This case could not have arisen until now, because the law has been changed by the Local Government Act, sect. 5, which extends the right to compensation to personal property of all kinds, with the limitation that the injurious act must be a crime punishable on indictment under the Malicious Damage Act, 1861. It plainly comes within that Act.

Holmes, L.J., who heard the argument, has been obliged to leave on public business, but he desires me to add that he concurs in our conclusion.

WALKER, L.J.—

I concur. I do not desire to add anything except as to Dr. Falconer's argument that it was with the consent of the property owner that the damage was done, and therefore the maxim *volenti non fit injuria* applies. I do not agree in that. Major Borrowes had a house with some valuable property, and he gave permission to use the grounds, such as is often given by a number of landed proprietors, who permit the public to have access to their demesnes. I fail to see how that gave to these boys the right to break into enclosed property. I do not think that they were invited there

Appeal. 1900. *In re* BORROWES. Walker, L.J.

at all in the sense which would lead to the application of the maxim quoted.

On the question of compensation for damage, what we have to consider is, not whether this particular act is within the purview of the Grand Jury Act, but whether it is within the present law of compensation for malicious injury, as enacted by sect. 5 of the Local Government (Ireland) Act. In my opinion it is.

As to Mr. Ronan's argument with reference to the case of the fifth boy that he was doing an innocent act in trying to get out, that is not the question; he had done what was unlawful in getting in, and then in kicking recklessly about with his foot in trying to get out, he broke the mirror. He was doing an unlawful and malicious act, punishable on indictment under the Malicious Damage Act.

Solicitor for applicant: *C. P. Tracy.*
Solicitor for Kildare County Council: *W. Grove White.*

R. D. M.

Q. B. Div. 1900. May 1. *Appeal.* June 5.

O'GRADY *v.* SYNAN (1).

Estoppel—Judgment—Certiorari to quash order of Inferior Court—Application refused—Grounds of decision different—Mistake of law.

Prior to December, 1889, the plaintiff was entitled to receive from the defendant a tithe rentcharge of £4 1*s.* 5*d.* per annum out of the lands of B., in the county of Limerick. In December, 1889, the defendant applied to the Chairman and Justices of the county to vary this tithe rentcharge, and by order of Quarter Sessions, dated the 30th December, 1889, it was reduced to £1 19*s.* 1*d.* The plaintiff then obtained from the Queen's Bench Division a conditional order for a writ of *certiorari* to quash the order of the Quarter Sessions; but on the 15th May, 1890, on cause shown, the conditional order was discharged. From May, 1890, until the decision of the Court of Appeal in *Regina* (*Metge*) v. *Justices of Meath* ([1898] 2 I. R. 592), on the 28th January, 1898, the defendant paid to the plaintiff, and the plaintiff accepted

(1) In the Queen's Bench Division, before ANDREWS, GIBSON, and KENNY, JJ.

from him, tithe rentcharge at the rate of £1 19*s.* 1*d.* It was admitted that the *Dublin Gazette* did not from 1887 to 1889 contain any publication of the average prices of corn, but the absence of such publication was not the ground upon which the order reducing the tithe rentcharge had been impeached. After the decision of *Metge's Case* the plaintiff sued the defendant to recover the difference between £4 1*s.* 5*d.*, and £1 19*s.* 1*d.*, for the years from 1890 to 1898. On a case stated :—

Held (affirming the decision of the Queen's Bench Division), 1, that the plaintiff was not estopped by the order of the Queen's Bench Division of the 15th May, 1890, from alleging that the order of the 30th December, 1889, was bad; and 2, that the plaintiff was entitled to recover six years of the arrears which had accrued prior to the commencement of the suit.

CASE STATED at the Spring Assizes for the county of Limerick, held on the 6th March, 1900, by Palles, C.B., on an appeal from a decision of His Honour Judge Adams dismissing a civil bill brought by the plaintiff to recover a sum of £19 18*s.* 11*d.*, arrears for 7⅔ years, at £2 2*s.* 4*d.* per annum, and one year at £4 1*s.* 5*d.*, of tithe rentcharge. It was admitted :—

1. That, prior to the 30th December, 1889, the plaintiff was entitled to receive and did receive from the defendant a tithe rentcharge of £4 1*s.* 5*d.* per annum out of the lands of Ballyvaddock, in the parish of Iveruss.

2. That, by an order of the Chairman and Justices of the county of Limerick, made at Rathkeale on the 30th December, 1889, the said tithe rentcharge payable out of the said parish was purported to be varied and reduced in the proportion of £1 18*s.* 8¾*d.* to 18*s.* 9¾*d.*

3. That thereupon, if such order were valid, the said rentcharge of £4 1*s.* 5*d.* became and was reduced to the sum of £1 19*s.* 1*d.* That a conditional order for a writ of *certiorari* to bring up and quash the said order on the grounds therein set forth was obtained from the Queen's Bench Division on the 1st May, 1890; and

4. That, by an order of the Queen's Bench Division of the 15th May, 1890, the said conditional order was discharged and the cause shown allowed. After the order of the 15th May, 1890, the plaintiff did not claim tithe rentcharge at the rate of £4 1*s.* 5*d.* per annum, for or in any year, until after payment of the gale

Q. B. Div. 1900. O'GRADY v. SYNAN.

which accrued due on the 1st May, 1898, but until after said 1st May, 1898, said plaintiff accepted £1 19*s.* 1*d.* yearly from the defendant, being the proportionate reduction made by the order of the Justices of the 30th December, 1889. It was admitted that the *Dublin Gazette* did not, from the year 1887 to the 30th December, 1889, contain the publication of the average price of wheat. His Lordship held that in no event could more than six years' arrears be recovered, and as to this no question was reserved.

It was contended on behalf of the defendants:—

1. That the plaintiff was estopped by the aforesaid orders of the Queen's Bench Division from alleging that the order of the 30th December, 1889, was bad.

2. That, having regard to the circumstances stated, the plaintiff was disentitled to recover any part of the arrears which accrued due on or before the 1st May, 1898: *O'Loghlen* v. *O'Callaghan* (1).

The Lord Chief Baron stated that his opinion was against the defendant on both points, but as the first was one which might constantly arise (many orders varying tithe rentcharge, which were made after the *Dublin Gazette* ceased to publish the requisite particulars as to the price of corn, having been brought before the Queen's Bench, upon conditional orders for *certiorari*, which were afterwards discharged), his Lordship consented to reserve a case for the Queen's Bench Division on the first question, and, while he did not himself see how the second contention of the defendant was capable of argument, he consented, being pressed to do so by Mr. Doyle, and as it did not involve any additional expense, to reserve the second point also.

The questions submitted for the determination and decision of the Queen's Bench Division were:—

1. Was the plaintiff estopped by the aforesaid orders of the Queen's Bench Division from alleging that the order of the 30th December, 1889, is bad?

2. Having regard to the circumstances stated, was the plaintiff disentitled from recovering any part of the arrears which accrued due on or prior to the 1st May, 1898?

(1) I. R. 8 C. L. 116.

Redmond Barry, Q.C., D. F. Browne, and *M'Elligott,* for the plaintiff.

The Solicitor-General (*Wright, Q.C.*), *R. Brereton Barry, Q.C.,* and *C. Doyle,* for the defendant.

ANDREWS, J.:—

Upon the first question, which the Lord Chief Baron has reserved for our decision in this case, I am of opinion that the plaintiff is not estopped by the orders of this Division, made on the application for a writ of *certiorari* to bring up and quash the order of the Justices of Limerick of the 30th December, 1889 (which purported to reduce the tithe rentcharge payable out of the parish of Iveruss), from alleging that the last-mentioned order is bad. The case of *Regina* (*Metge*) v. *The Justices of Meath* (1) has established that that order is not only bad but bad on its face, as it refers for its foundation to the *Dublin Gazette,* which did not contain the essential materials upon which alone the order could have been legally made. It appears from the affidavit on which the *certiorari* in the case of *Regina* (*O'Grady*) v. *The Justices* of *Limerick* was applied for, that two grounds only were therein relied on, viz. that the order of the Justices was made at an adjourned Sessions, and that some of the Justices were interested in the subject of the order. The conditional order, as drawn up, added a third ground, viz. the want or excess of jurisdiction on the part of the Justices; but the Queen's Bench order of 15th May, 1890, merely ordered that the cause shown should be allowed and the conditional order for the *certiorari* discharged. It does not appear upon what ground or grounds that order was made, and we know that at the time it was made the fatal effect of the absence from the *Gazette* of the only materials upon which the order of the Justices could be legally made was wholly overlooked, as for a number of years afterwards it continued to be. For this reason alone it appears to me that the order of 15th May, 1890, cannot be treated as having in any way determined the validity of the order of the Justices, especially having regard to the question which was for so long overlooked, and was only recently

(1) [1898] 2 I. R. 592.

Q. B. Div. 1900. O'Grady v. Synan. Andrews, J.

determined in *Metge's Case* (1) for the first time. But further, the order of 15th May, 1890, was an order on the Crown side of the Court between different parties, and was simply a decision that the writ of *certiorari* should not go; and even if there had been a decision by the Court on the question determined in *Metge's Case* (1), this order did not amount to a judgment given directly upon it, and could not sustain a plea of *res judicata*, nor be conclusive on this question. The order of 15th May, 1890, in itself, neither is nor necessarily involves an adjudication on this question, and transit in *rem judicatam* cannot be predicated of it by reason of that order. I need not do more than refer to the *Duchess of Kingston's Case* (2) for the law on this subject, as to which case see the observations of Selborne, L.C., in *The Queen* v. *Hutchings* (3). No case was cited, and I am not aware of any case in which it was held that an order on *certiorari* has or could have the effect which it has been sought to give to the order of 15th May, 1890.

Upon the second question reserved by the Lord Chief Baron, I am of opinion that the plaintiff is not disentitled to recover any part of the arrear of the tithe rentcharge which accrued due on or prior to 1st May, 1898. The case of *O'Loghlen* v. *O'Callaghan* (4), which was relied on for the defendant, has not, in my opinion, any application to the present case, which is not a case of payment by the defendant of the difference between the sums of £4 1*s.* 5*d.* and £1 19*s.* 1*d.*, but of non-payment of that difference. It is not a case of claims on each side and a settlement of accounts converting allowances into payments. The only claim was on the plaintiff's part, and he simply was paid and received less than he was legally entitled to, both parties being under the erroneous impression that the Justices' order was a valid one. This neither amounted to payment nor discharge of the differences. It is elementary that payment of a smaller sum than the sum due is not a discharge of the entire; and not only was no discharge of the differences expressed to be made or contemplated, but there was no consideration for such discharge. In the case of *Fitzgerald* v. *Lord Portarlington* (5), in the Equity Exchequer in 1835, it was held

(1) [1898] 2 I. R. 592.
(2) 2 Sm. L. C. 10th Ed. 713.
(3) 6 Q. B. D. 300, p. 304.
(4) I. R. 8 C. L. 116.
(5) 1 Jones, 431.

that, after the acceptance by a landlord for many years of an abated rent, the tenant ought to have reasonable notice before action that the landlord would insist on the payment of the original rent, and this decision was acted on by Deasy, L.J., on the hearing of a civil bill appeal in 1882 in the case of *Ambrose* v. *Keohan* (1); but in cases of this kind the landlord, knowing his rights, may be regarded as having, so far as past payments are concerned, made equitable gifts of the differences to the tenant; and I do not think that these decisions are applicable to the present case, which will now go back to the Lord Chief Baron, with our answers in the negative to the two questions he reserved for our decision, and, under the circumstances, we think the defendant must pay to the plaintiff his costs of the special case and the argument thereon.

GIBSON, J.:—

The main question in this case is whether the discharge of a conditional order for *certiorari* to quash what was admittedly a void adjudication at Quarter Sessions constitutes an estoppel. The case is not like *Reg.* (*Norcott*) v. *Justices of County Cork* (2), where *certiorari* having been allowed the order of the Justices was brought into this Court, and the order having been duly quashed, a *mandamus* was awarded. Whether even in such a case a void order pronounced in obedience to such *mandamus* could be held by reason of such *certiorari* and *mandamus* to bind the parties by estoppel is far from clear.

Here, however, the order of Quarter Sessions never got among the records of this Court, as *certiorari* was refused. It is admitted that the order was without jurisdiction and void. In the opinion of Walker, L.J., in *Metge's Case* (3), the order, being based on the Gazettes, is bad on its face. Does an unsuccessful attempt to quash an order void on its face deprive a party aggrieved of all right to object to the order when it is sought to be enforced against him?

(1) 17 I. L. T. R. 7. (2) 28 L. R. I. 185.
(3) [1898] 2 I. R. p. 632.

Q. B. Div. 1900.

O'GRADY v. SYNAN.

Gibson, J.

The Court never had its attention directed to the fundamental defect of jurisdiction arising from the character of the *Gazettes* No doubt the conditional order for *certiorari*, in accordance with the common form, relied on want of jurisdiction among other grounds. But, even assuming that we cannot look at the affidavits for the purpose of ascertaining the nature of the want of jurisdiction (if any) complained of, the Court did not *necessarily* determine that the Quarter Sessions had jurisdiction. It may have held that the point was not clear, and that as the question was of a civil character, it might be more properly decided in an action or other civil proceeding: *Ex parte Gifford* (1). A refusal of a motion, like a verdict of not guilty, may not be an estoppel, as it may mean no more than that the case has not been proved, or that the Court does not think fit to allow the relief: *Reg.* v. *Hutchings* (2).

Again, to constitute estoppel, the decision must be directly upon the very point, and not merely upon something incidentally cognisable. Where an order, bad upon its face for want of jurisdiction, is sought to be enforced in a civil Court, can the failure to obtain relief on a collateral application for *certiorari* conclude the party from showing that the order was void? see *Ballantyne* v. *Mackinnon* (3).

It is not necessary to decide how the case would have stood if the Court, after argument, had in 1890 adopted the view taken by O'Brien and Johnson, JJ., in *Metge's Case* (4), and refused the *certiorari* expressly on that ground. My present impression would be that the refusal of the collateral remedy would not estop from showing that the order was a nullity in a proceeding where the validity of the order came directly in question.

Very properly the County Court Judge deferred to the authority of this Court, but I think the opinion of my Lord Chief Baron that there was no estoppel was plainly right. The second point reserved in the case, viz. that the arrears could not be recovered by reason of mistake of law, is quite unsustainable. I entirely agree with the opinion of my brother Andrews on the question.

(1) Carrow's Sess. Cas. 490.
(2) 6 Q. B. D. at p. 306.
(3) [1896] 2 Q. B. p. 462.
(4) [1898] 2 I. R. 593-610.

KENNY, J.:—

Having regard to the decisions of this Court and of the Court of Appeal in *Metge's Case* (1), it was impossible for the defendant to avoid making the admission which his counsel made, that the Justices of the county Limerick who made the order of the 30th December, 1889, purporting to vary the tithe rentcharge, did so without jurisdiction. With that admission, only one point remained for argument, namely, whether the fact of this Court having on the 15th May, 1890, discharged a conditional order for a *certiorari* to quash the order of the Justices operated as a personal estoppel to prevent the plaintiff from now alleging that the order of 1889 was a nullity. To constitute an estoppel by record there must be an adjudication, and that adjudication must purport to determine the very point which is in issue in the second action. It seems to me that neither of these conditions is fulfilled in the present case. There is no adjudication. The order of this Court, which is relied on as having that character is but an order declaring that, in the discretion of the Court, a writ of *certiorari* should not issue. It is not an adjudication as of record between the parties in the sense in which this expression is used in cases of estoppel. But even were it to be regarded as in the nature of a judgment, it has not been shown that it decided the point involved, in the present case. As a matter of inference I entertain no doubt that though the conditional order for the *certiorari* states as a ground for quashing the Justices' order that it was made "without jurisdiction," the circumstances now admitted as fatal to that order were never for a moment present to the minds of the Court or of any one concerned in the case. I therefore decline to hold that the point now in dispute was there determined, and I am of opinion that the plaintiff is not estopped from raising it.

On the second question stated in the case I need only add that in my opinion the case of *O'Loghlen* v. *O'Callaghan* (2) does not apply.

A. E. R. J.

(1) [1898] 2 I. R. 592, 624. (2) I. R. 8 C. L. 116.

Appeal. 1900.

O'GRADY v. SYNAN.

June 5.

The defendant appealed (1).

The Solicitor-General (*Wright, Q.C.*), *R. Brereton Barry, Q.C.*, and *C. Doyle*, for the appellant:—

The plaintiff is estopped by the orders of the Queen's Bench from saying that the order of the 30th December, 1889, was bad A party aggrieved by an order of an inferior Court cannot apply for a writ of *certiorari* to quash it a second time on the same state of facts, *Greathead* v. *Bromley* (2). The issue in the Court of Queen's Bench was the validity of the order of the Sessions: *Henderson* v. *Henderson* (3); *Langmead* v. *Maple* (4); *Blake* v. *O'Kelly* (5). The Court could have held the order bad upon any ground, but they did not do so.

On the second point we contend that this was a mistake of law, and the plaintiff cannot recover: *O'Loghlen* v. *O'Callaghan* (6).

Redmond Barry, Q.C., *D. F. Browne*, and *M'Elligott*, for the plaintiff, were not called on.

The judgment of the Court was delivered by—

FITZ GIBBON, L.J.:—

We do not think it necessary to call on counsel for the respondent, as we are satisfied that the decision of the Queen's Bench is right, for the reasons stated in the judgments. This is an attempt to extend the doctrine of estoppel to a case where it does not apply. There being a tithe rentcharge fixed, an application was made to the Quarter Sessions, and an order was obtained, purporting to vary it. That order was impeached by the tithe-owner, who moved at the Crown side of the Queen's Bench, for a *certiorari* to quash the order. The result was that the cause shown was allowed. But as regards the judgment, all that appears is that the cause shown being allowed, the order stood; the grounds upon which the order was impeached or the cause was allowed are not stated.

(1) In the Court of Appeal before FITZ GIBBON, WALKER, and HOLMES, L.JJ.

(2) 7 T. R. 455.

(3) 3 Hare, 100.

(4) 18 C. B. (N. S.) 270.

(5) I. R. 9 Eq. 54.

(6) I. R. 8 C. L. 116.

To create an estoppel, it would be necessary to show that there was a decision on the very point at issue, and this is not shown here, nor is it true, because the point now raised was not then made. An order in the same form has since been held by this Court to be bad on the face of it, because the subject-matter of jurisdiction, the prices which ought to have been published in the *Gazette*, did not exist. The contention of the appellant amounts to this, that if an unsuccessful attempt by one tithe-payer has been made to set aside an order which is bad on the face of it, the failure of that attempt makes the order effectual, and in effect good, against all other tithe-payers; in other words, that an unsuccessful attempt by one person to obtain a *certiorari* estops every one else from saying that the order is bad on its face. We could not hold that if a bad order had been made on the tithe-owner's application, purporting to increase the tithe rentcharge, the order would bind everybody to pay the increase, if an application to quash it had been refused. This is the converse case.

The second point made by the appellant is that because receipts were given and accepted for the payment made, the difference cannot now be recovered. It is settled law that payment of a lesser sum will not discharge a debt, unless there has been a settlement of account; or a release by deed; or some estoppel by conduct, making it inequitable afterwards to demand the balance due. Here neither accord and satisfaction, nor any other defence, has been shown to discharge the debt.

The appeal must be dismissed with costs.

Solicitor for the plaintiff: *Hastings.*
Solicitors for the defendant: *F. Kearney & Son.*

R. D. M.

Appeal.
1900.

May 16, 17, 19.

PICTON *v.* CULLEN (1).

Practice—Receiver—Equitable execution—National schoolmaster—Instalment of salary actually due—Public policy.

The Court has jurisdiction to appoint a receiver over an instalment of a National schoolmaster's salary which has actually become due.

It is not against public policy that an instalment of such a salary, when actually due, should be liable to execution.

The plaintiff recovered judgment against the defendants in an action tried at Belfast for £46 10*s.*, and his costs of suit. Judgment was entered and a writ of *fi. fa.* issued against the defendant, to which there was a return of *nulla bona*. The defendant was a school teacher at Belfast, under the Board of National Education, in receipt of a salary of £35 a-year, and a further allowance of £7 a-year, called 20 per cent. in addition to salary. The salary was payable in quarterly instalments, and at the date of the application a quarterly instalment was due to the defendant, and would be payable on the 15th April. The defendant resided with his father, who was also a school teacher and the principal in the school where the defendant taught. The defendant was unmarried and had no person depending on him for support. On the 6th April, 1900, the plaintiff applied to be appointed receiver by way of equitable execution, over a sum of £10 3*s.* 6*d.*, a quarter's salary, due on the 1st April, which would be payable on the 15th April, and Kenny, J., made the order.

On appeal to the Divisional Court, consisting of two Judges, there was a difference of opinion between them, Palles, C.B., being of opinion that it was against public policy that a receiver should be appointed over the defendant's salary. Johnson, J., dissented from this, and held that a receiver should be appointed. Johnson, J., withdrew his judgment, and the order of Kenny, J., was accordingly reversed.

(1) Before Lord Ashbourne, C., and Fitz Gibbon and Holmes, L.JJ.

From this order the plaintiff appealed.

Appeal. 1900.

PICTON v. CULLEN.

M'Auley, for the appellant:—

Once the instalment became due the Court has jurisdiction to appoint a receiver by way of equitable execution. In *Murphy* v. *Green* (1) a receiver was appointed over the pension of a Constabulary officer. *Molony* v. *Cruise* (2) is the case of the pension of a civil servant. *Manning* v. *Mullins* (3) is to the same effect, and there the form of order is given by which the matter was worked out. There is no other way of getting payment of the debt: *Lucas* v. *Harris* (4); *Flarty* v. *Odlum* (5). It is not against public policy: *Grenfell* v. *Dean of Windsor* (6); *Re Mirams* (7).

Whitaker, for the respondent:—

The order of Kenny, J., cannot be sustained. In *Apthorpe* v. *Apthorpe* (8) it was held to be against public policy to attach the pay of a navy surgeon. A receiver will not be appointed in cases where a Court of Equity would not before the Judicature Act have appointed a receiver: *Holmes* v. *Millage* (9). It is against public policy: *Grenfell* v. *Dean of Windsor* (10); *Wells* v. *Foster* (11); *M'Carthy* v. *Goold* (12); *Cooper* v. *Reilly* (13).

LORD ASHBOURNE, C.:— May 19.

This is an interesting point which has been well discussed before us, and we have received every assistance from counsel. It came before Kenny, J., sitting in the Queen's Bench Division, on a motion on behalf of the plaintiff, who had a claim against the defendant for £36 6*s.* 7*d.*, which still remained due along with costs, for an order that the plaintiff should be appointed receiver by way of equitable execution over a sum of £10 3*s.* 6*d.*, then actually due to the defendant. It appears that the defendant,

(1) 26 L. R. Ir. 610.
(2) 30 L. R. Ir. 99.
(3) [1898] 2 I. R. 34.
(4) 18 Q. B. D. 127.
(5) 3 T. R. 681.
(6) 2 Beav. 544.
(7) [1891] 1 Q. B. 594.
(8) 12 P. D. 192.
(9) [1893] 1 Q. B. 551
(10) 2 Beav. 544.
(11) 8 M. & W. 149.
(12) 1 Ba. & Beat. 387.
(13) 2 Sim. 560.

Appeal. 1900.

PICTON v. CULLEN.

Lord Ashbourne, C.

a National schoolmaster, was entitled to a salary of £35 per annum, and a further allowance of £7, making altogether £42, besides some fees which would bring in some increment. At all events he was a National schoolmaster, with an income of £42, and a sum of £10 3*s.* 6*d.* was actually due to him from the Commissioners of National Education in respect of salary and emoluments.

Kenny, J., on an *ex parte* application, following the practice of the Court, made an order that "the plaintiff be appointed receiver without fee, salary, or security by way of equitable execution over the beneficial interest of the defendant in the said sum of £10 3*s.* 6*d.*, to answer in part payment of the plaintiff's said judgment debt, and that said receiver do account before a Master of this Division at such time or times as he the said Master shall appoint as to the sum or sums he may receive hereunder." The case was then brought by the defendant before the Divisional Court of Queen's Bench, composed of the Lord Chief Baron and Johnson, J. Johnson, J., was of opinion that the practice of the Court was clear, and that the order of Kenny, J., being pronounced in accordance with that practice, should be upheld. The Chief Baron did not differ from the view so expressed of the practice of the Court, and under ordinary circumstances he would have concurred; but being of opinion that it was against public policy that a person in the position of the defendant should be deprived of his means of livelihood, he was of opinion that the order of Kenny, J., should be reversed. Then Johnson, J., withdrew his judgment, and thus the judgment of the Chief Baron became the judgment of the Court. This appeal has been brought to have the judgment of Kenny, J., restored.

The point suggested by the Chief Baron is full of interest and importance. It was admitted by Mr. Whitaker that the question of public policy cannot stop here, and if the consideration of public policy is good in the case of a National schoolmaster in receipt of £42 a-year, it is good with regard to any public servant who may be discharging public duties, for which he receives public money. It might extend to an official with a salary of £500 or £5000 a-year. I am not aware that it is requisite for the State to get people to come forward and serve as public officials by holding out the great new inducement that their

salaries cannot be attached. I cannot see why people who are paid for discharging duties as public officials should get this extraordinary privilege. It would be difficult to discern why, on any principle of fairness, people who are not in the public service, should be liable to every form of execution for the purpose of making them pay their debts, while public servants should be placed in a position of immunity from receivership orders against pay or salary already earned and actually due. I put aside questions of future instalments and assignments, and confine myself to the narrow limits of this case, where a National schoolmaster, who is owed £10 3*s.* 6*d.* by the Commissioners of National Education for work already done, and pay already due, has an order made against him appointing the judgment creditor receiver by way of execution over that sum. In my opinion there is no principle of law or public policy to safeguard that from execution according to the settled practice of the Court, and I think that the order of Kenny, J., is right, and should be restored.

Then Mr. Whitaker, at the close of his argument, presented another view of the case, viz. that it was not right to attach the entire of this sum of £10 3*s.* 6*d.*, but that only a portion of it should be taken, as the means of sustenance should be left to the defendant. That is a matter which may well be left to the discretion of the Judge of first instance. I have no doubt that Kenny, J., would take everything into consideration before he made the order, and that if these topics were discussed before him he would do what was fair and reasonable. I see no reason for varying the figures.

FITZ GIBBON, L.J. :—

We are told that the Lord Chief Baron considered his opinion to be at variance with the existing practice of the Queen's Bench, and that, in deference to this practice, he had wished to withdraw his judgment. We have, therefore, to deal with a claim to immunity which is novel, or is at least an extension of any hitherto recognised immunity from execution.

If the principle of the order is right, the only ground upon which we could vary it in detail would be some injustice, or inconvenience, in the mode in which the Court below had exercised

Appeal. 1900.

PICTON v. CULLEN.

Fitz Gibbon, L.J.

its discretion. Mr. Whitaker asked us to reduce the amount by half. The difference, in point of justice or convenience, between compelling the defendant to pay £10 3*s.* 6*d.* or £5, is microscopic. We have only to deal with one quarterly payment of £10 3*s.* 6*d.*, the previous quarter was not attached; and the defendant has some income from fees besides. It is impossible to hold that an order for £5 could be right, if the order for £10 3*s.* 6*d.* was wrong. I therefore come to the question of principle.

The ground of public policy on which the Chief Baron went has never, hitherto, been extended so far. This is not an attachment of future income; it is not a case in which a man has attempted to assign, or to charge, a salary provided by the State for his maintenance. Many arguments apply to attachment and assignment which do not apply to execution for a debt. I am willing to assume that a National schoolmaster cannot assign or charge his salary, and that it cannot be attached *in futuro*. I assume all that the Lord Chief Baron has said about assignment and attachment to be well founded; but we have to deal with income already earned by a debtor, and actually due and payable to him for his own use, and as his own money. I cannot see that public policy requires us to give to people whose income is derived from public funds, an immunity from paying their debts which others have not. If a National schoolmaster could receive and keep his income without paying his debts, consequences would follow which would at once raise the question whether it was for the public advantage that he should be allowed to keep his place any longer. But, furthermore, the supposed policy is one to which it would be impossible to give effect. The public interest, if it exists, must be concerned in keeping the teacher in a position to do his work efficiently; but he could be summoned under the Debtors' Act; he would be liable to an order to pay his debt by instalments; he could be committed on default of payment; his furniture could be seized under *fieri facias;* and it seems to me that his public usefulness would be just as much impaired by leaving him without furniture, or by putting a bailiff into his house, or by making an instalment order against him under the Debtors' Act, as by allowing his creditor to receive a quarter's salary by way of equitable execution. I think public policy

should make a National schoolmaster pay his debts, and be as honest as other people. Where is the public disadvantage of allowing incomes to be applied in payment of debts to stop? It cannot depend on the source from which the income is derived. It is disadvantageous to the public that doctors on whom the public health may depend, or others who serve the public in any capacity, should be in pecuniary difficulties.

A point was put forward in *Mullins Case* (1) which does not arise here. There is a public policy in not embarrassing public departments with the administration of the affairs of impecunious officials. That point must be put forward, not by the debtor, but by the Department. It was so put forward in *Mullins Case* (3); but the action of the Commissioners of National Education in this case on the former occasion, and their inaction now, show that they do not object to pay the money to the creditor here, on receiving an order to do so.

For these reasons, I think that the practice of appointing a receiver by way of equitable execution should not be interfered with in this case. It is to be remembered that this practice is only a substitute for arrest for debt, and an improved process for the recovery of debts.

I think that the appeal should be dismissed with costs.

HOLMES, L. J.:—

The ground on which the Divisional Court reversed the order of Mr. Justice Kenny was that to appoint a receiver by way of equitable execution over a sum due to a National school teacher on account of his salary, would be to deprive him of a fund paid by the State to enable him to perform a public duty, and would therefore be contrary to public policy.

We are familiar with the cases in which it has been held that a public servant cannot assign his salary either by way of sale or to secure a debt. In some of these cases, the decision was based upon statutory provisions; in others, upon public policy. I am quite prepared to concede, for the purposes of this appeal, that the case of a National schoolmaster comes within them, and that

(1) [1898] 2 I. R. 34.

Appeal. 1900. PICTON v. CULLEN. Holmes, L.J.

his future income cannot be assigned or attached. Indeed, apart altogether from public policy, since *Holmes* v. *Millage* (1) it has been held that a receiver by way of equitable execution cannot be appointed over the future earnings of anyone, whether he be a public servant or not.

But no such question arises here. The defendant has earned a sum of money. It is now his property. If he had received it, he might have paid a debt with it, even although he might thereby have deprived himself of sufficient means of subsistence for some time to come. Yet public policy would not interfere. If he were to buy a chair or table with it, the chattel could be seized by the sheriff, who could also take the money itself in execution if the judgment debtor retained it in the form of bank notes or coin. If his salary had been received by an agent, or lent to a friend, the creditor could get hold of it by means of a garnishee order. In all these cases, the public policy recognized by the law is that a man's property ought to be made available to pay his judgment debts; and I see no reason why the same principle ought not to apply where the salary is still in the hands of the official paymaster, provided that it has been already earned. To apply the principle relied on by the defendant to the order in this case would be not merely to extend it beyond precedent, but to introduce a novel rule of law.

The only other objection to the order cannot be sustained. It is said that it ought to have been confined to one-half the sum due. Mr. Justice Kenny might have so confined it; but in the exercise of his discretion he included the full amount. There is no principle involved in the difference between £10 and £5; and to allow an appeal upon such a point would be absurd.

Solicitor for the plaintiff: *Thomas Maguire.*
Solicitor for the defendant: *Joseph Donnelly.*

R. D. M.

(1) [1893] 1 Q. B. 551.

SPENCE *v.* PARKES (1).

Q. B. Div. 1900. April 26, 27. May 9.

County Court—Practice—Interpleader—Service out of the jurisdiction—Civil Bill Act, 1851 (14 & 15 *Vict. c.* 57, *sect.* 150).

The County Court has no jurisdiction to pronounce a decree upon an interpleader process, the service of which was effected upon the defendant at his residence in England.

CASE stated for the opinion of the Queen's Bench Division by the Right Hon. Mr. Justice Gibson at County Antrim Spring Assizes, 1900. The case was as follows:—

1. This was an appeal by the defendant from a decree by the acting County Court Judge at Ballymena Sessions on an interpleader process.

2. The defendant (Benjamin Smith Parkes) had obtained a civil bill decree from the said Judge against William James Spence, and had seized certain goods in execution under said decree. The plaintiff (Mary Jane Spence) alleged that a large part of the goods so seized were her *bonâ fide* property, and took these interpleader proceedings in respect thereof.

3. The defendant, at the date of the original decree, and from that time to the present resided at Dudley, Staffordshire, England, and he never had any residence or place of business in Ireland.

4. The interpleader civil bill was served on defendant at his English residence. The question for the opinion of the Court is whether there was jurisdiction upon such service to pronounce a decree.

J. G. GIBSON.

Dated at Belfast the 19th day of March, 1900.

Robert Todd, for the defendant:—

The County Court has no jurisdiction except such as has been conferred by statute. There is nothing in any of the statutes

(1) Before PALLES, C.B., and JOHNSON and BOYD, JJ.

Q. B. Div. 1900. SPENCE v. PARKES.

conferring jurisdiction authorizing the service of a civil bill process of any kind out of the jurisdiction. Section 150 of the Civil Bill Act, 1851 (14 & 15 Vict. c. 57), which constitutes this procedure by interpleader civil bill, gives no right to serve such interpleader civil bill upon a person residing out of the jurisdiction. *In re Busfield* (1) decided that service of an originating summons cannot be effected out of the jurisdiction. *The Credits Gerundeuse, Limited* v. *Van Weede* (2) is distinguishable; the service of the interpleader summons out of the jurisdiction was treated as a mere notice of proceedings within the jurisdiction. *In re Cliff; Edwards* v. *Brown* (3) is a case in point.

Gordon, Q.C., and *M'Cutcheon*, for the plaintiff:—

The Civil Bill Act (14 & 15 Vict. c. 57) in its preamble states that its object is to provide a cheap and expeditious remedy for the recovery of small debts in Ireland, and in the particular section under which the interpleader process is brought it is explained that the procedure is meant to furnish a cheap and expeditious mode of adjudicating on conflicting claims as to property seized on foot of civil bill decrees. There is no limitation in this section as to the residence of the defendant in the interpleader process; and, the debt on foot of which a seizure was made having been recovered in Ireland, the procedure prescribed by the section is required and proper even where the plaintiff in the original suit resides in England. By so bringing an action in an Irish County Court a plaintiff, according to general principles of law, submits himself to the jurisdiction of those Courts in all matters arising out of the action, and the ownership of the goods seized on foot of the decree is one of such matters; and the interpleader process is really a notice in the course of the proceedings to come in and support the claim to the goods, rather than a new action. If the section were held not to extend to persons resident out of Ireland, then the remedy of the owners of goods wrongfully seized on foot of decrees by special bailiffs, which is the ordinary mode of execution, would be gone. That this view commended itself to the Lord Chancellor is seen from the ninth rule of the Rules of

(1) 32 Ch. D. 123. (2) 12 Q. B. D. 171. (3) [1895] 2 Ch. 21.

the County Court, 1890, which provides for service of an interpleader process outside the county where the seizure took place.

[They referred to *M'Cracken* v. *Campbell* (1).]

Cur. adv. vult.

May 9.

PALLES, C.B. :—

The question reserved by Gibson, J., is whether the Civil Bill Court has jurisdiction to pronounce a decree upon an interpleader process, the service of which was effected upon the defendant at his residence in England.

It is well settled that, at common law, the process of a Court cannot be served outside the limits of its territorial jurisdiction. If service beyond the jurisdiction be authorized, the authority must be conferred by statute, or by a rule which has the force of a statute. As stated by Cotton, L. J., in *In re Busfield* (2), "Service out of the jurisdiction is an interference with the ordinary course of the law, for generally Courts exercise jurisdiction only over persons who are within the territorial limits of their jurisdiction, . . . apart from statute, a Court has no power to exercise jurisdiction over anyone beyond its limits."

Thus, the question comes to this: Has this service been authorized by statute? And as the 14 & 15 Vict. c. 57 is the only Act which has been relied upon as conferring the authority, the question is further narrowed to one of the construction of that Act.

Its preamble is that "the recovery of small debts by civil bill has been found to be beneficial to the Queen's subjects in Ireland," and that "it would conduce to the improvement of the administration of justice there if the several statutes and parts of statutes relating to the recovery of small debts by civil bill, and of tenements by civil bill ejectments, and relating in other respects to the jurisdiction of the civil bill courts, were consolidated, with such additions and alterations as hereinafter contained and that the existing Acts relating to the said matters should be repealed." After this recital the Act, by its first section, repeals the Acts and parts of Acts set forth in the schedule (A); and that schedule contains

(1) 19 I. L. T. R. 69.

(2) 32 Ch. D. 123.

Q. B. Div. 1900.

SPENCE v. PARKES.

Palles, C.B.

many Acts of the Irish Parliament in which are to be found the germs of the jurisdiction now vested in the Civil Bill Courts. Of course none of these Acts could in any way relate to England. The 165th section enacts that "the Act shall extend to Ireland only, save where the contrary is hereby expressed." The words "where the contrary is hereby expressed" are satisfied by sect. 4, which charge salaries upon the Consolidated Fund. Sects. 45 and 46, to which I shall hereafter refer, and which provide for service within the jurisdiction upon particular persons being substituted, in cases of ejectment and replevin, for service upon persons resident outside the jurisdiction, does not extend the scope of the Act beyond Ireland.

Pausing here for a moment, it seems clear that the statute is one which regulates the procedure of a certain class of Courts in Ireland; and that, even were they Superior Courts, it would be implied, in any section relating to service, that such service should be effected in Ireland, unless the contrary was clearly expressed. In this view the decision in *The Queen* v. *Lightfoot* (1) is an express authority. The question there was the sufficiency of the service in Scotland of a summons in bastardy. The ground of the judgment of the majority of the Court negativing the validity of the service is there stated by Crompton, J.:—"By statute 7 & 8 Vict. c. 101, sect. 75, the Act is to extend only to England and Wales; and Scotland for the purposes of the Act may be taken as a foreign country, and the question really is whether service in a foreign country is sufficient. I think that the summons and the service of the summons *are in the nature of process*, and of a proceeding in a bastardy cause, and that it has no force beyond England and Wales." This decision was followed in *Berkley* v. *Thompson* (2). To the same effect is the decision of the Court of Appeal in England in *Ex parte O'Loghlen* (3), in which the question was whether a debtor summons of the Court of Bankruptcy in England could be served in Ireland. There James, L. J., says:—"If an Irish gentleman can thus be served in Ireland with a summons from the English Court of Bankruptcy, on the application of an Irish creditor, the power to direct such service must exist in the

(1) 6 El. & Bl. 824. (2) 10 App. Cas. 45. (3) L. R. 6 Ch. App. 406.

case of a debtor and creditor resident in any part of the world, for in the Act of 1869 Ireland and Scotland are excepted, so that the provisions of the Act apply no more to two Irishmen resident in Ireland than to two Parisians. If this can be done, I see no reason why a Frenchman in Paris may not take out a debtor summons here against a German serving in the invading army." Mellish, L. J., puts the principle thus:—"In dealing with Acts of Parliament of this description, which are intended only for particular parts of the United Kingdom, the true principle of construction is that all things which are to be done under the authority of the Court must be done within the jurisdiction unless the Act expressly or by necessary implication enables them to be done elsewhere."

But these Courts are not Superior Courts. They are not only Inferior Courts, but Courts limited in respect of their local jurisdiction, and therefore, were there nothing to the contrary, there would be implied, in relation to service, the further restriction that it should take place within the local limits of the jurisdiction of the Court.

With these observations, I come to the section which, it is insisted, confers the jurisdiction, to see whether from it I can gather anything to the contrary of that conclusion which should otherwise be arrived at. It is section 150. It commences by a recital that "difficulties may arise in the execution of" decrees under the Act against goods, "by reason of claims being made to the property of such goods by persons not being the parties against whom such decree or order has issued; and it is reasonable to afford a cheap and expeditious mode of adjudicating on such claims"; and then it proceeds to enact that "when any goods taken under any decree . . . of any Civil Bill Court in Ireland shall be claimed by any person who is not a party to such a decree . . . it shall be lawful for the said person" to make a certain affidavit, upon lodgment with the sheriff of which, and of the amount of the decree, the sheriff is to issue an order for delivering up the goods to the person so claiming; and "the person so claiming the said goods, and depositing the said money . . . shall cause a civil-bill process to be served on the plaintiff or party in such decree . . . at whose suit such goods shall have been taken, stating that he claims the

Q. B. Div. 1900.

SPENCE v. PARKES.

Palles, C.B.

same as his property; and *the said civil bill shall be returnable to the Quarter Sessions for the division of the county in which such seizure was made* next after such deposit with the said sheriff, . . . and the said civil bill as to the said claim of property shall be served, heard, and determined as any ordinary civil bill." There is then a proviso that the Assistant Barrister, if he shall think fit, and if damages be claimed in the process, may give damages not exceeding £5 for the original taking.

Two things are to be observed in reference to this section, one of which has been relied upon in favour of the plaintiff, the other of which tells in favour of the defendant:—1. The mischief intended to be remedied exists equally whether the party at whose suit goods have been taken is resident within or outside the jurisdiction; and the words of the enactment are general—"when *any* goods taken under any decree shall be claimed." But, 2, the claim to the goods is to be determined upon the hearing of a civil bill process which is to be "*served* . . . as any ordinary civil bill," and in the suit thus directed to be instituted the chairman is at liberty to give damages to the extent of £5. In result, then, although the words conferring jurisdiction are general, that jurisdiction, when conferred, authorises not only a determination against the execution creditor of his right to seize the goods, but also a personal decree against him for damages.

Now the section, as I have said, enacts that the process shall be *served* as an ordinary civil bill. This provision refers us back to sections 65 to 67, which regulate the mode of such service. Section 65 enacts that the service shall be effected "either by personal service of the civil bill process, or by leaving a copy thereof at the defendant's house or place of residence . . . with the wife, child, father . . . or any other relation of the defendant or of his wife, or with any servant or clerk"; and section 67 authorises service on any relative, wife, or servant of the defendant, who usually resides with him, who shall be outside the dwelling-house or place of residence of the defendant, but within a reasonable distance of it, provided that at the time of service personal service on the defendant, or service on any person within the dwelling-house, could not have been effected.

Now, section 69 enacts that save in exceptional cases unneces-

sary to be mentioned, no defendant shall be liable to be sued at any sessions to be held outside the division of the county in which he usually resides. Now I think it clear that, taking sections 65 and 67 in reference to service of ordinary civil bills, their scope is restrained by the two limitations I have already called attention to, viz. 1, that of Ireland ; 2, that of the county.

We have now to take them as they are imposed in section 150, which by expressly directing that the civil bill shall be returnable to the Quarter Sessions for the division of the county in which such seizure was made, removes the implied limitation of the county. It does so because service at the residence is authorised, and that residence may be outside the county. Accordingly, Order VI., Rule 9, of the County Courts (Ireland) Orders, 1890, contemplates service of the civil bill out of the county. In my opinion, however, it does not affect or alter the other limitation, that which arises from what I may call international considerations, and what is *prima facie* inherent in the Court being an Irish one, viz. that where not expressly provided to the contrary, its process cannot be served outside Ireland. Were there nothing else in the Act, I should be prepared to rest my judgment upon this ground alone.

But there is much more in the Act. The service of process, in cases of replevin and ejectment, is excepted from sections 65 and 67. Service of the process in replevin is regulated by section 45, and that in ejectment by section 81 and the following sections.

Section 45, after providing that the process in replevin shall be served in the same manner as civil bills for the recovery of debts, contains the following proviso : "In case the party on whose behalf such distress was made shall not reside within the jurisdiction . . . service . . . on the person who made the distress for him, or on any bailiff who shall be in charge of the goods so distrained, shall be deemed good service on such party" ; and then occur words which show that the knowledge was present to the Legislature that express and clear words are necessary to confer jurisdiction over a party not residing within the jurisdiction ; "and such party, *although not residing within the county or riding*, shall, for the purposes of this Act, be deemed and taken to be within the jurisdiction of the Assistant Barrister of the county or

Q. B. Div. 1900.

SPENCE v. PARKES.

Palles, C.B.

riding in which the distress was made." These words remove the limitation of the county; they do not affect the quasi-international limitation of Ireland.

Section 86 provides for service of ejectment processes where the defendant does not reside on the lands, and it contains the following proviso: "provided always, that if a defendant shall have gone out of Ireland, and shall have left his wife and family residing in the dwelling-house usually occupied by him while in Ireland, service of the process in ejectment upon his wife or any member of his family, being of the age aforesaid, at such dwelling-house, shall be deemed and taken as good service of the process upon the defendant, so as to enable the landlord or owner to obtain a decree for the possession of said lands."

Upon a consideration of these sections, and of other sections to which I do not think it necessary to refer, I have arrived at the conclusion that in the absence (as there is here) of express enactment to the contrary, not only would there be an implication that the service should be in Ireland, but that an affirmative intention to that effect is to be collected from the statute. As against this, we have nothing more than the general intention to be gathered from section 150 to confer a summary remedy by interpleader in every case of seizure, under a decree, of goods claimed by a third party. But, in my opinion, this would be insufficient to rebut even the implication arising from the nature of the statute; and certainly cannot defeat that implication when it is fortified by the affirmative intention to the same effect which is to be gathered from the statute. The decision of *Berkley* v. *Thompson* (1) in the House of Lords is a strong authority in favour of this view.

I think it unnecessary to discuss at length the other cases which have been referred to. If *The Credits Gerundeuse* v. *Van Weede* (2) can be supported at all, which I doubt, it can be so only upon the ground put by Pollock, B., at page 173. He says, "It is one of the first principles of all judicature that wherever there is a dispute as to the right to property, or its value, all the parties interested therein shall be before the Court, in order that the matter may, if possible, be finally settled, and complete justice

(1) 10 App. Cas. 45. (2) 12 Q. B. D. 171.

done. Now, in the present case, the Court, by making the order asked for, does not assert any present *jurisdiction* over Jordi, or propose to compel him to submit to its process; but merely gives him notice of the proceedings which are to be taken."

The process in the present case cannot be treated as notice. If well brought, it does assert jurisdiction over the defendant; it does compel him to submit to its process, and authorises a personal decree for damages being made against him. Upon this question the admirably reasoned judgment of Stirling, J., in *La Campagnie Générale d'Eaux Minérales et de Bains de Mer* (1), in which I entirely concur, is in point.

The question reserved must be answered in the negative.

JOHNSON and BOYD, JJ., concurred.

Solicitor for the plaintiff: *Boal.*

Solicitor for the defendant: *John K. Currie.*

J. L.

(1) [1891] 3 Ch. D. 467.

Q. B. Div.
1900.
Jan. 30.

Appeal.
Feb. 15.

LEVIN *v.* O'KEEFFE (1).

(1899. No. 17,108.)

Promissory note—Loan—Concealment of identity of lender—Borrower's right to repudiate.

O'K. borrowed £135 from a money lender whose real name was L., but who on the occasion of the loan described himself as carrying on business as C. O'K. passed his promissory note, payable to C. for £200, whereof £65 represented interest on the loan. The loan was repayable by four instalments of £50 each, with the condition that upon default in payment of any one instalment the entire balance then due on foot of the note, was to become payable at once. O'K. made default in payment of the third instalment, whereupon an action was brought against him by L., trading as C., for £100, being the amount of the two remaining instalments.

Upon motion for final judgment, it appeared that O'K. must have been aware that C. was trading under a fictitious name, although he swore that he did not not know that the real lender was L. He further swore that he would not have borrowed the money if he had known that the real lender was L., whom he knew to be an exacting money lender:—

Held, that O'K. should be at liberty to defend the action on the terms of lodging in Court within a week the balance due of the principal sum advanced with interest at 5 per cent. to abide the further order of the Court, the costs of both parties in that event to be costs in the cause, but in default of so doing the plaintiff should have judgment with costs.

Gordon v. *Street* [1899], 2 Q. B., 641, followed.

MOTION for final judgment. The action was brought to recover £100 on foot of a promissory note made by the defendant to James Cameron on the 7th January, 1899. The note was made payable by four instalments of £50 each, one on the 7th May and the others on the 7th August, 7th November, and 7th February, and contained a provision that if default were made in the payment of any of these instalments the entire balance should become due and payable. At the time the note was signed only the sum of £135 was in fact advanced, and the residue, £65, was

(1) Before GIBSON and MADDEN, JJ.

retained for interest. The defendant also wrote and signed a memorandum that only £135 was advanced, that he acknowledged that the residue was retained for interest, and that the note was read to him, and that he understood it. The defendant made default in the payment of the third instalment, and after some letters had been written to him in the name of James Cameron, the payee mentioned in the note, the present action was brought by Joseph Levin, trading as James Cameron, claiming £100, the amount of the two remaining instalments. In answer to the plaintiff's application for final judgment the defendant made an affidavit, stating that some time in the year 1898 he applied to James Gardiner of South Mall, Cork, for a loan of £100. Gardiner wanted to charge him £40 for the loan, which he considered excessive, and consequently refused to borrow any money from him. Some months afterwards he received a letter from Walter C. Woodbury of No. 1 Camden Quay, Cork, offering to lend him any money he might require. In response to this letter he called on Woodbury, who took him to the office of Gardiner. Woodbury then told him to come back in an hour or so, and he would see what he could do for him. He returned at the appointed time and signed the note, whereupon a roll of bank notes was thrown to him on the table by Woodbury, who quickly left the office. On counting the bank notes the defendant drew the attention of the clerk who remained in the office to the fact that instead of receiving £200 he only received £135. The clerk said it was all right. The defendant protested, and asked where was Woodbury. The clerk replied that Woodbury was not his name at all, but James Cameron, that he had left for Dublin, and that the defendant would probably hear from him in a few days. The defendant subsequently paid two instalments, amounting to £100, and several letters were written in the name of James Cameron, threatening an action and execution and bankruptcy if he did not pay the balance. The defendant, as he said, to avoid exposure, offered in addition to the £100 already paid, to pay the balance of the cash advanced, viz. £35, with interest at 5 per cent. When he was served with the writ he discovered that neither Woodbury nor Cameron was in fact the lender, but Joseph Levin, who, as the defendant alleged, was a notorious and oppressive money

Q. B. Div. 1900. LEVIN v. O'KEEFFE.

lender, whereupon he repudiated the contract, and offered to pay into Court the balance due, viz. £35, and interest at 5 per cent. Had he known that Levin was the lender he would not have taken the loan.

Gaussen, for the plaintiff:—

This case is distinguishable from *Gordon* v. *Street* (1). The defendant knew at the time that he took the loan and signed the note that he was borrowing from a man who was trading under an *alias*.

P. D. Fleming, for the defendant:—

Gordon v. *Street* (1) applies. The defendant has made a sufficient case by affidavit to defeat a motion for final judgment.

GIBSON, J.:—

If a man chooses to carry on this business under a number of *aliases*, he invites such a defence as has been put forward here, namely, that his character was such that the disclosure of his true name might have deterred the intending borrower. The object of using the *alias* is *prima facie* (though not necessarily) to conceal identity. The personality of the money lender may in some cases be a material element. The defendant here apparently knew that the name Cameron was an *alias*, but he swears that he was unaware that Levin was the principal, and he alleges that, knowing Levin's reputation, he would not have gone to him. Several of the allegations in the defendant's affidavit are not explained by the plaintiff. We think, however, that the defendant's case is open to a good deal of suspicion. He will be allowed to defend on lodging in Court the balance due of the sum advanced, namely, £35, with interest at 5 per cent., within one week, to abide further order, the costs of each party in this motion in this Court to be costs in the cause. In default of payment the plaintiff will have judgment with costs, including the costs of this motion.

(1) [1899] 2 Q. B. 641.

Q. B. Div. 1900.

LEVIN v. O'KEEFFE.

MADDEN, J.:—

I agree in the conclusion arrived at by my brother Gibson, although I cannot say that in my opinion the case is free from doubt. The defendant's letter, written at the time of this transaction, satisfies me that he is not making an honest case in alleging that he thought that he was to receive £200 in cash. It also shows clearly that he knew that Woodbury was trading under an *alias*. Having regard, however, to the defendant's undertaking, I think the case may fairly be investigated.

J. L.

Appeal. 1900.

Feb. 15.

The plaintiff appealed to the Court of Appeal (FITZ GIBBON, WALKER, and HOLMES, L.JJ.)

Gaussen, for the appellant.

P. D. Fleming, for the respondent.

The Court affirmed the decision of the Queen's Bench Division.

Solicitor for the plaintiff: *Herbert Malley.*
Solicitor for the defendant: *John Keppel.*

G. Y. D

Q. B. Div.
1900.

May 16, 17.
June 25.

BRADY *v.* WARREN (1).

(1900. No. 969.)

Trespass—Animals ferae naturae—*Rabbits—Deer*—Sic utere tuo ut alienum non laedas.

In the year 1898 W. came into possession of a demesne where there were rabbits and deer, which trespassed upon adjoining lands in the occupation of B., doing considerable damage to his crops. W.'s predecessor had, on two occasions, let loose foreign rabbits, with a view to the improvement of the breed, and W. had, since he entered into possession, trapped the rabbits for profit, and exported them to England, but had done nothing to improve them or increase their numbers. Rabbits bred in considerable numbers on B.'s lands as well. The deer, which at one time had been confined within a walled deer-park in the demesne, broke loose in the year 1893, through a temporary breach in the wall, and only portion were recaptured. The remainder had since been wandering about the demesne, breeding there, and trespassing continually on B.'s lands, but always returning to the demesne. W., with his friends, occasionally shot the deer for sport; and, in response to B.'s complaints, told him that he might shoot them; and, in fact, gave it out generally in the neighbourhood that he desired that anyone who could shoot them might do so. At the same time he kept a wood-ranger, whose duty it was to look after the deer, and his predecessor had occasionally fed the deer in winter time with hay, laurels, and oats:—

Held, that W. was not liable in respect of the damage done by trespass of the rabbits:—

Held (Boyd, J., *diss.*), that there was evidence to support the finding of the jury that the deer were W.'s deer, that they were tame and "kept" by W., and under his control; and that W. was liable upon that finding for any damage done by the deer to B.'s land and crops.

John Brady had two adjoining farms, one under Mr. St. Ledger of 80A. 3R. 30P., and another of 54A. under Augustus Riversdale John Blennerhasset Warren, the St. Ledger holding adjoining Warrenscourt demesne for three quarters of a mile. The other was separated from the demesne by three fields of the St. Ledger holding.

(1) Before Palles, C.B., and Johnson and Boyd, JJ.

Mr. Warren, upon the occasion of his marriage in January, 1898, entered into possession of Warrenscourt, under an assignment from his father, Sir Augustus Riversdale Warren, Bart. Formerly the deer in the demesne were enclosed in a deer park, about 40 acres in extent. Portion of the wall of the deer park was blown down in the year 1893, and a number of the deer escaped into the demesne. The breach was repaired about six months afterwards, but numbers of the deer continued to roam through the demesne. It did not appear that any of those confined in the park had escaped since that time, but it was stated that there had been fresh breaches from time to time, and that some were of recent date. About eight years ago, they began to trespass on Brady's farm, doing much damage to his oats, corn, turnips, pasture, and meadowing. The trespass became very bad in the year 1898, the boundary fence of the demesne being insufficient to enclose them, and as many as from twenty to twenty-two appeared on Brady's farm at the one time. They passed backwards and forwards between the demesne and Brady's land, and were quite wild, and out of Mr. Warren's control. Mr. Warren frequently got up shooting parties amongst his friends, and shot the deer in the demesne. He told Brady two or three times that he might shoot the deer, and in fact gave it out generally in the neighbourhood that he wished everybody who could to shoot them. He kept a wood-ranger, whose duty it was to look after the deer. This man had seen deer wandering away from the demesne as far as the townland of Dooniskey, three miles off, but he could not say whether they returned. Sir Augustus Warren was accustomed to feed the deer in winter time with hay, laurels, and oats, but his successor did not feed them.

Rabbits had always bred in considerable numbers in the demesne, and trespassed upon Brady's lands; but Brady admitted that he did not mind the rabbits at all, if Mr. Warren kept the deer away. The rabbits bred on his own farm, as well as in Warrenscourt. About twelve years ago Sir Augustus Warren imported half a dozen Belgian rabbits, and about seven years ago brought some bucks from England with the object of improving the breed of the rabbits for sale. Mr. Warren employed three or four men in trapping the rabbits, and exported them under contracts to Manchester to the number of about 4000 in the year.

Q. B. Div. 1900.

BRADY v. WARREN.

Brady complained to the agent of the estate, Mr. Carroll, who visited him in September, 1898, and said he would write to Sir Augustus Warren or his son about the matter. He offered Brady a half year's rent of the small holding—£8 15*s.*—as compensation for the damage done by the deer and rabbits, to which Brady replied that they would do that much damage in a single night. Brady withheld his rent of the small holding for two and a-half years to bring the question of compensation to a point He paid that rent in 1899, and upon the 18th January, 1900, instituted this action for damages.

The action was tried before Lord Justice Fitz Gibbon and a county common jury at the Cork Spring Assizes of 1900. A direction was asked for by defendant's counsel on the ground that there was no evidence that the defendant "kept" either the deer or rabbits. This was refused by the learned Lord Justice.

The following were the questions left to the jury, and their answers:—

1. Were any of the rabbits which went on the plaintiff's farm kept by the defendant?—Yes; they were.

2. Were any of those rabbits the rabbits of the defendant?—Yes.

3. If so, were such rabbits kept with reasonable care to prevent them from damaging plaintiff's farm?—No; they were not.

4. If not, what amount of pecuniary damage was done to the plaintiff by the defendant's want of reasonable care from the 6th January, 1898, to the 18th January, 1900?—£10.

5. Were any of the deer which went on the plaintiff's farm kept by the defendant?—Yes; they were.

6. Were any of those deer the deer of the defendant?—Yes.

7. If so, were such deer kept with reasonable care to prevent them from damaging the plaintiff's farms?—No; they were not.

8. If not, what amount of pecuniary damage was done to the plaintiff by the defendant's want of reasonable care from the 6th January, 1898, to the 18th January, 1900?—£102 8*s.*

Judgment was entered for the plaintiff, in all, for £112 8*s.*, with costs.

The defendant moved to have this judgment set aside upon the ground that there was no evidence that the defendant kept or had any such property or control over the deer or rabbits as rendered him liable for any damage done by them to the plaintiff, or that the defendant was guilty of any negligence in or about the keep of the deer or rabbits, and that the Judge should have directed a verdict for the defendant; also upon the grounds that the Judge misdirected the jury by telling them that if the defendant used the deer or rabbits for the purpose of profit or support it would be such a keeping as would render the defendant liable in point of law for any damage done by them to the plaintiff; and also upon the grounds that the findings were against the weight of evidence, and that the damages were excessive.

Conner, Q.C. (with him *Ronan, Q.C.*, and *Cole Bowen*), for the defendant:—

Since *Boulston* v. *Hardy* (1) it is settled that it is legal for a person to have rabbits on his land, and that he is not liable in trespass for the injury done by such rabbits to the land of his neighbours. The principle is subject only to this modification, that the land must not be so overstocked with rabbits or game as necessarily to cause injury to the neighbouring land. There is no evidence here that the defendant did anything whatever to artificially increase the rabbits. The entire evidence is that he killed as many as he could. As to the "turning down" of a few rabbits by the defendant's predecessor a number of years ago, if it be legal for a person to put any rabbits on his land, as to which there can be no question, there was nothing unreasonable in doing something that would only have the effect of improving the breed; but even if there were such unreasonableness it would not make the defendant liable, the rabbits being admittedly wild rabbits. [The following cases were also referred to upon this branch:—*Sutton* v. *Moodey* (2); *Birkbeck* v. *Paget* (3); *Paget* v. *Birkbeck* (4); *Hilton* v. *Green* (5); *Farrer* v. *Nelson* (6).]

(1) Rep., Part V., 104 b; more fully, Cro. Eliz. 547 (21).
(2) 1 Lord Raymond, 250.
(3) 31 Beav. 403.
(4) 3 F. & F. 683.
(5) 2 F. & F. 821.
(6) 15 Q. B. D. 258.

Q. B. Div. 1900.

BRADY v. WARREN.

Upon the second branch of the case, deer are *feræ naturæ*; and a man is only responsible for their acts when he keeps them under his control as tame deer. All the evidence is that these deer were wild in the highest degree. The fact that these deer or their ancestors had, at one time, been kept within a walled enclosure does not render them tame within the meaning of the authorities when they have for a number of years enjoyed their original freedom and bred in a wild condition. No acts of ownership by the defendant are shown save such as might be reasonably exercised by him in reference to animals admittedly wild, such as his preventing trespassers from coming on his land. The fact that the defendant's predecessor upon one occasion fed the deer does not affect the question at issue here, because the defendant merely took an assignment of the lands, and never exercised any rights of property over the deer which he found upon them.

[He referred to *The Case of Swans* (1); *Mallocke* v. *Eastly* (2); *Hannam* v. *Mockett* (3); *Blades* v. *Higgs* (4); *Davies* v. *Powell* (5); *Morgan* v. *Abergavenny* (6); *Ford* v. *Tynte* (7); *Anonymous Case* (8).]

Redmond Barry, Q.C., and *P. D. Fleming*, for the plaintiff:—

Rabbits are naturally indigenous to the soil, but in this instance the defendant introduced buck rabbits. He farmed them, and intentionally increased their numbers. The doctrine *sic utere tuo ut alienum non laedas* applies. The defendant trapped the rabbits, and actually used them for the purpose of trade and profit, having contracts for their sale with Manchester merchants. Although the rabbits were on the land at the time he succeeded his father, still he was liable for the continuance of the nuisance.

Up to nine or ten years ago, when the deer broke out of the park, they were admittedly tame. When did they become wild? They had the instinct that Warrenscourt was their home, and when they strayed into neighbouring pastures, they always returned to the demesne; they had the *animus revertendi* (9). All

(1) 7 Rep. 15 b.
(2) 3 Levinz, 227.
(3) 2 B. & C. 934.
(4) 11 H. L. Cas. 621.
(5) Willes' Rep. 46.
(6) 8 C. B. 768.
(7) 2 J. & H. 150; 31 L. J. Ch. 177.
(8) 1 Vent. 295.
(9) Blackstone, vol. ii., pp. 398-9.

their fawnings were in the demesne, and not outside it. The defendant's predecessor fed them with hay and laurels up to 1898; they were looked after by a wood-ranger, or game-keeper, whose duty it was to count them. It does not appear that there were any other deer in the locality, save the Warrenscourt deer; and the defendant, when it suited him, got up shooting parties from time to time, and used the deer for the sport of himself and his friends.

The following authorities were referred to: *Filburn* v. *The People's Palace and Aquarium Co.* (1); *Rylands* v. *Fletcher* (2); *Hilton* v. *Green* (3); *Boulston* v. *Hardy* (4).

Ronan, Q.C., in reply:—

There is no evidence of keeping analogous to that relied upon in *Ford* v. *Tynte* (5), and *Morgan* v. *Abergavenny* (6).

BOYD, J.:—

June 25.

The plaintiff claims damages from the defendant in respect of injuries to his crops by rabbits and by deer kept by the defendant. It has not been proved that the defendant had unduly increased the rabbits on his property. The only evidence as to the rabbits was that some years since a few bucks were imported and let loose on the defendant's lands; but I cannot see how the introduction of these bucks amongst the rabbits, which have at all times been numerous on the lands both of the plaintiff and defendant, can have increased the number to any great amount. No doubt their introduction may have, and probably has, improved the breed and made the rabbits better, but that was the only effect. This, of itself, would not give the plaintiff any cause of action against the defendant. Large numbers have been each year trapped by the defendant both on his own lands and also on the lands of the plaintiff, by his permission, and sold by the defendant.

In *Sutton* v. *Moodey* (7), Holt, C.J., has stated the law as follows:—"If a man keeps conies in his close (as he may), he has

(1) 25 Q. B. D. 258.
(2) L. R. 3 H. L. 330.
(3) 2 F. & F. 821.
(4) Rep., Part V., 104 b; more fully, Cro. Eliz. 547 (21).
(5) 2 J. & H. 150.
(6) 8 C. B. 768.
(7) 1 Lord Raymond, 250.

Q. B. Div. 1900. BRADY v. WARREN. Boyd, J.

a possessory property in them so long as they abide there; but if they run into the land of his neighbour, he may kill them, for then he has the possessory title in them." This same case further decides that a man has a property *ratione loci* in animals which are *feræ naturæ* on his land, but this property ceases when they quit his land. The right of the owner of a forest or warren in the animals of the forest or warren continues after they are hunted out of the forest or warren, but not after they voluntarily quit it.

In *Boulston's Case* (1) it was decided that if a man makes cony burrows in his own land which increase in so great numbers that they destroy his neighbour's land next adjoining, his neighbour cannot have an action on the case against him, for so soon as the conies come on his neighbour's land he may kill them.

I am of opinion that the plaintiff has no cause of action against the defendant for the damage caused by rabbits, and that the verdict found for him in respect thereof should be set aside.

Now, as to the damage by the deer. In Blackstone's Commentaries by Kerr (1857 Ed.), 398, the law as to animals *feræ naturæ* is stated as follows:—"A qualified property may subsist in animals *feræ naturæ per industriam hominis* by a man reclaiming and making them tame by art, industry, and education; or by so confining them *within his own immediate power* that they cannot escape and use their *natural* liberty," and the distinction is drawn "between such animals as we usually see tame, and therefore seldom seen wandering at large., and such creatures as are usually found at liberty, which are therefore supposed to be *more emphatically feræ naturæ*, though it may sometimes happen that the latter shall be sometimes tamed and confined by the art and industry of man, *such as deer* in a park, hares, or rabbits in an enclosed warren, doves in a dove-house, pheasants in a mew, hawks that are fed and commanded by their owner, and fish in a private pond or in tanks. These are no longer the property of a man than while they continue in his *keeping* or *actual possession*." Blackstone refers to authorities in support of these propositions.

It is said the deer which were on the defendant's lands are fallow deer, and not red deer, and it has been suggested that the

(1) Rep. Part V. 104 b; more fully, Cro. Eliz. 517 (21).

former are not naturally *feræ naturæ*. I cannot follow this distinction, and find no authority to support it. I think all deer are alike, *feræ naturæ* and that the mere difference of breed can make no distinction. It might as well be contended that because one species of hawk is tamed and used for falconry, and others seldom, if ever, so used, the former should not be considered *feræ naturæ* and the latter should—that one species of the same genus can be more easily tamed "by the art and industry of man" can surely make no difference in their original nature. By nature all deer are wild and accustomed to roam through forests and all over the country, and seek shelter and security wherever they can find it.

Of these animals the predecessor of the defendant confined a number "within his own immediate power" in his deer park, so that they could not "use their natural liberty." So long as they remained there they were in his "actual possession or keeping." About eight years ago some of these deer, as stated in the evidence of the plaintiff, "broke out of the park," and thus escaped from the actual possession or keeping of the defendant's predecessor; and as the defendant proved "it is out of the question to try to put them back into the park, it is very hard to get at them." "The deer are quite wild; it is impossible to catch them." The defendant's demesne is very extensive, and contains 697 statute acres, and about 400 to 500 acres of this consist of wood and water. The deer which are now in the demesne and which roam about over the country, and have trespassed on the plaintiff's lands, are either some of the deer which originally broke out of the park (if any be still alive), or their offspring. None have broken out of the park since 1893. The only evidence of any kindness or attention shown to the deer in the demesne is that given by the plaintiff, who says, "Sir Augustus Warren fed them through the winter with hay, laurels, and oats." When this feeding took place is not stated, but the plaintiff further states, "the present man, his son, did not feed them so far as I know." I do not consider this evidence any evidence of "keeping or actual possession," no more than it would be evidence that a man who in winter fed sparrows or blackbirds or other wild fowl, should therefore be liable for their depredations, even though they were bred about his place.

Q. B. Div. 1900.

BRADY v. WARREN.

Boyd, J.

It is said, however, that though it was the habit of the deer to roam from the demesne, they always returned to it. Such is the evidence, but what does it amount to? The same might be said of grouse or partridges, as they always return to the moors or fields where they are bred. Surely it cannot be contended that these birds are kept, or in the actual possession of the owner of the lands to which they were in the habit of returning.

It has also been contended that because Sir Augustus Warren and his friends occasionally had shooting parties to shoot the deer, that this was evidence of his keeping them. In my opinion a man has a right to hunt and shoot any wild animals which may be on his lands, and that such hunting and shooting is no evidence against him, that he kept them or had them in his actual possession while they are alive. It is admitted on the evidence, that the defendant told the plaintiff when he complained about the deer that he should shoot them. He says, "I shoot the deer, not that I have any objection to other people doing so. I told the plaintiff two or three times he might shoot them. I let it be generally known that I wish everybody to shoot them who can."

The plaintiff only came into possession of the property in January, 1898, and since that date at all events, he has done nothing to maintain or keep the deer, and as I have mentioned, he has on the contrary made it generally known that everyone might shoot them so far as he was concerned.

On all these grounds, I am of opinion that the defendant has not the deer in his keeping or actual possession, and that they are *ferœ naturæ*, and having formerly escaped, they have resumed their naturally wild character, and are not tamed or confined and use their natural liberty. The escaped deer and those bred in the woods of the demesne are totally different from those in the deer park. The latter are confined, and are in the defendant's own immediate possession; they are reclaimed, and cannot use their natural liberty. I am, on the whole case, of opinion that the verdict, both as to the rabbits and deer, should be set aside, and that the verdict should be entered for the defendant. I also think the damages found by the jury are unreasonably excessive. The plaintiff holds 142A. 3R. 30P. at a rent of £74, or a little over 10s. an acre. The crops which were more or less injured according to

his evidence, grew on 21 acres, and the jury have awarded him £112 8*s.*, or at a rate of £5 an acre. If he made the same rate out of the remainder of his farm, he would have an income of £674 8*s.* out of his farm, or £600 a year over his rent. As no evidence was given to rebut his evidence of damages, I do not base my judgment on the question of damages.

JOHNSON, J. :—

Plaintiff by his statement of claim complains of damage to his farm and crops—1, by defendant's trespass on his land by and with his deer and rabbits; 2, by defendant's negligent management of his lands adjoining plaintiff's farm, and negligently breeding, maintaining, and keeping, unreasonably large numbers of deer and rabbits on defendant's lands which overrun plaintiff's farm; and 3, by causing deer and rabbits in numbers to overrun plaintiff's farm.

Defendant, by his statement of defence, traverses the alleged acts, negligence, and grievances, and as to the rabbits also pleads a defence founded on *Boulston* v. *Hardy* (1).

Under deed 6th January, 1898, defendant on his marriage became, in succession to his father Sir Augustus Warren, possessed and entered into occupation of (*inter alia*) the mansion, demesne, and lands of Warrenscourt; the demesne (including water) comprises between 400 and 500 acres. The plaintiff is in possession and occupation of two holdings, one (the smaller), held formerly under defendant's predecessor and now under defendant, is separated from Warrenscourt demesne by the other and larger holding, of which plaintiff is judicial tenant under another landlord, and which for about three quarters of a mile is bounded by this demesne. Plaintiff has possessed and lived on his farm for sixty-five years.

The case in reference to the rabbits differs, I think, from the case in reference to the deer. In any point of view, the rabbits were wild rabbits, *ferœ naturæ*, fit for the food of man; in one point of view the deer were tame, domesticated deer, not *ferœ naturæ*, and different considerations, therefore, may be applicable to each case. First, as to the rabbits; for sixty years wild rabbits have

(1) Rep. Part V. 104 b.; more fully, Cro. Eliz. 547 (21).

Q. B. Div. 1900.

BRADY v. WARREN.

Johnson, J.

burrowed, bred, and existed in Warrenscourt demesne, and also in plaintiff's farm, and there is no evidence how, or when, they originally got or came to either place. Some years before defendant was possessed of or occupied Warrenscourt, his predecessor, Sir Augustus Warren, the then owner and occupier, enlarged on this demesne of 400 or 500 acres two Belgian rabbits, never seen again and supposed to have died, and afterwards enlarged in the demesne twelve white or coloured buck rabbits, brought from other lands, and whose strain subsequently appeared in wild rabbits more or less coloured. Naturally wild rabbits came out of the demesne on plaintiff's farm, fed there and damaged his grass and crops as well when Sir Augustus Warren was in possession of the demesne as since defendant came into possession, but the expressions of the plaintiff (which were pressed in argument), that "the whole demesne is a warren," and that the rabbits "came in shoals," are shown by his own evidence to be mere extravagances of language, because he says, "I do not count the rabbits at all if the deer were kept away." "I would not mind the rabbits if they kept off the deer." There is no evidence that the defendant, since he became possessor of Warrenscourt, has done anything, either by turning down, or collecting rabbits on his lands, or by destroying vermin, which by preying on rabbits keep down their numbers, or by making fresh burrows, or by any other means or in any other way, to bring rabbits, or to breed, increase, maintain, or keep rabbits on his lands. On the contrary, on his own, as well as on plaintiff's land (by plaintiff's permission), defendant has trapped the rabbits and sold them in Manchester, in considerable quantities, four or five hampers a-day (about 3000) in 1899, and a larger number in 1898. Both before and since defendant became possessed of Warrenscourt, plaintiff complained of damage to his farm by deer and rabbits from the demesne. In September, 1898, Mr. Carroll, defendant's agent, offered, out of an arrear of rent due by plaintiff, to allow half a year's rent (£8 15*s.*) for the damage complained of: this plaintiff refused, and claimed to retain the entire arrear of his rent then due for his damage up to that time. This was not acceded to, and plaintiff issued his writ in January, 1900, and in the following month paid his arrear of rent. The law distinguishes between animals *feræ naturæ*, fit for

the food of man, and those which are not: see *Hannam* v. *Mockett* (1). The rabbits in question were wild rabbits *feræ naturæ*, fit for the food of man, and assuming they burrowed and bred in the demesne of the defendant, they were not his rabbits. Lord Westbury, L.C., in *Blades* v. *Higgs* (2), where the animals then under the consideration of the House of Lords, were wild rabbits, says: "When it is said by writers on the Common Law of England, that there is a qualified or special right of property in game, that is in animals *feræ naturæ*, which are fit for the food of man, whilst they continue in their wild state, I apprehend that the word 'property' can mean no more than the exclusive right to catch, kill, and appropriate such animals, which is sometimes called by the law a reduction of them into possession." Wild rabbits captured or killed on defendant's land and so reduced into possession there, even by a trespasser, become then and thereby defendant's rabbits and his absolute property: if they stray into plaintiff's farm and are captured or killed there, they then and thereby become plaintiff's rabbits and plaintiff's absolute property when so reduced into possession there. It is the Common Law right which every owner of land has to kill and take all such animals *feræ naturæ* as may from time to time be found on his land, and as soon as this right is exercised, the animal so killed or caught becomes the absolute property of the owner of the soil: *Blades* v. *Higgs* (2). In order to maintain the present action it is not sufficient for the plaintiff to show that he has sustained damage by wild rabbits which came from defendant's demesne; he must also show that such damage was caused by defendant's going beyond what was reasonably necessary in order to enable him to have the natural and reasonable use and enjoyment of his own land, which is his lawful right. If the plaintiff only shows that his land is damaged by defendant using his land in the natural manner he cannot succeed. At the present time it is not an unlawful or unnatural or unreasonable use of land for the owner to have on it ground or feathered game or rabbits, all wild by nature, to such a moderate extent as the land is so circumstanced as to be reasonably capable of supporting; and if, pursuing their natural instincts, the

(1) 2 B. & C. 934. (2) 11 H. L. Cas. 621, p. 631.

Q. B. Div. 1900. BRADY v. WARREN. Johnson, J.

ground game or rabbits stray or winged game fly to neighbouring land, the neighbour, though he sustain damage by such game or rabbits, has not, I think, a right of action against the owner of the land from which such game or rabbits stray or fly; because being wild by nature, he has no property in them, and the neighbour may himself acquire the property in them by reducing them into possession on his land, and then it is his game or rabbits. This is the ground of the decision in *Boulston* v. *Hardy* (1), and is the opinion expressed by Erle, J., in *Hilton* v. *Green* (2). "If rabbits were put" (by the defendant in that case) "into Buckney's wood" (which was not part of the plaintiff's holding), "and thence strayed into the plaintiff's farm, the defendant would not be liable for the injury they caused." It may be that the case would be different if the damage of which the plaintiff complains was caused by the defendant actively doing anything going beyond what is reasonable to enable him to have the natural use and enjoyment of his own land, such as bringing, or collecting, or preserving (which is equivalent to bringing or collecting), game wild by nature *feræ naturæ* ground or feathered, on his land to an immoderate extent beyond what the land is reasonably capable of supporting—over-burdening, or, as it is commonly expressed, over-stocking, his land with game, which must in that case, in the nature of things, seek for sustenance or shelter elsewhere. Thus Pollock, B., in *Farrer* v. *Nelson* (3), referring to the case of an action lying against a person who collects animals on his land so as to injure the crops of his neighbour, says, "beyond doubt such an action would lie, and the rule on which it would be founded would be not so much negligence as upon an infraction of the rule *sic utere tuo ut alienum non lædas*." This maxim does not, I think, tend much to the solution of the question now under consideration, because, as Erle, J., points out (4): "The maxim is mere verbiage; a party may damage the property of another where the law permits, and he may not where the law prohibits, so that the maxim can never be applied till the law is ascertained, and, when it is, the maxim is superfluous." It does not (as I have observed), appear how or when wild rabbits originally

(1) Rep., Part V., 104 b; more fully, Cro. Eliz. 547 (21).
(2) 2 P. & F. 821, p. 827.
(3) 15 Q. B. D. 258, p. 260.
(4) El. Bl. & El. 643.

got into plaintiff's or defendant's lands, but they have been in both, for at all events sixty years, and it is common knowledge that wild rabbits in land where they can burrow naturally increase and spread rapidly. The report of *Boulston* v. *Hardy* (1) is more full in Cro. Eliz. than in Coke's note. In that case the defendant put rabbits into two burrows which he had made on his own land adjoining plaintiff's land, which "increased to a great number and went into the plaintiff's land and destroyed his corn and made it barren"; the only question in that case was "whether an action on the case lay upon this matter," and it was held that it did not. The reason given by Anderson, J., is that the defendant had no interest (by which I understand property) in the rabbits—that the person damaged might kill them, "and they may be said to be his conies when they come on his land." *Boulston's Case* (1) is over and over again referred to in Abridgments and Text-books to the present time, and I have not found any authority overruling or questioning it on this point. It goes far beyond the facts of the present case, and if it is to be overruled, it should be by a Court of Appeal; if it is law at the present day, it covers even the case (which is nothing like the present case) of a land owner making new burrows and putting rabbits into them on his own land, even though they naturally increase to a great number in their wild state, and go into a neighbour's land and damage his crops. The resolution in *Boulston's Case* (1) as to dove cotes is dissented from in *Dewell* v. *Sanders* (2), where it was held that although the erection of a dove cote is not a common nuisance, a person who sustains a private injury from the doves may have redress before the Justices in Eyre. But the case of tame doves or pigeons is not similar to that of wild rabbits; such doves or pigeons are not *feræ naturæ*, though the apertures in the dove cote or pigeon house afford them free and unrestricted liberty at their will; and they are considered to be on the footing (*Reg.* v. *Cheafor* (3)) of domestic poultry, as chickens, ducks, and geese, which are all allowed to go at large, but their owner is responsible for the damage they cause. As

(1) Rep., Part V., 104 b.; more fully Cro. Eliz. 547 (21).
(2) Cro. Jac. 490.
(3) 2 Den. C. C. 361.

Q. B. Div. 1900.
BRADY v. WARREN.
Johnson, J.

Williams, J., says, in *Cox* v. *Burbidge* (1), "If a man's cattle or sheep, or poultry, stray into a neighbour's land or garden, and do such damage as might ordinarily be expected to be done by things of that sort, the owner is liable to his neighbour for the consequences." But it would be a different thing if the pigeons were wild pigeons (woodquests), *ferœ naturæ*, birds fit for the food of man, but very mischievous to gardens or crops, and I am not aware of any authority which lays it down that an owner of land to whose trees woodquests resort, and in which they nest without any act or inducement of his, is liable for the damage they may cause to his neighbour, or that he is under any duty to his neighbour to exterminate the birds, or reduce their number, or destroy their nests. It is, however, in no way inconsistent with this, that a person by acts of over-stocking his land with game or rabbits, or by acts of over-preservation, may in fact go beyond what is reasonable to enable him to have the natural and lawful use and enjoyment of his own land, and bring about an actionable nuisance injurious to his neighbour. The present case does not, however, raise this broad question. The question of substance in this case is, I think—Since the defendant became possessed of his land, and before action, has he in respect of the wild rabbits in his demesne in anything that he has done gone beyond what was reasonable to enable him to have the natural and lawful use and enjoyment of his demesne? Lord Justice FitzGibbon told the jury "it was for them to say on all the evidence including the evidence of stocking, of trapping for profit, and of the offer of compensation by Mr. Carroll, whether the defendant 'kept' the rabbits on his land in such numbers or under such circumstances as to cause further or additional damage (beyond natural and reasonably to be expected trespass of rabbits, having due regard to the existence of rabbits in the locality), but only so far as he could have prevented it by reasonable fencing, or by killing a larger number, or by other reasonable means." Regard to the existence of rabbits in the locality presumably includes the damage to plaintiff by the rabbits burrowing and breeding on

(1) 13 C. B. (N. S.) 430, p. 438.

plaintiff's own land. The Lord Justice also told the jury, that "both as to the deer and rabbits, before they could find for the plaintiff, they must be satisfied that there was a use of them by the defendant as his property, which would impose a duty of reasonable care not to injure his neighbour in the mode of using his own property," and the questions left to the jury in respect of the rabbits were in the same terms as those in respect of the deer, substituting the word "rabbits" for the word "deer." The jury seem to have dealt with the questions left to them as to the defendant keeping the rabbits and keeping the deer, and of their both being the animals of the defendant, as the same in substance, both as to rabbits and deer; but I think the rabbits were not the rabbits of the defendant, nor his property, nor kept by the defendant; they were wild rabbits, burrowing and breeding in the demesne as much *ferœ naturæ* as would have been woodquests roosting and nesting in the trees in the demesne. The case of the deer is, were they defendant's tame domesticated deer, defendant's property, not wild deer, *ferœ naturæ?*

The only evidence that there was a use of the rabbits by the defendant as his property, is that he captured and killed, as any occupier of land might, wild rabbits on his land, which then, and not until then, became his rabbits and his property; but this does not, I think, impose the suggested duty on the defendant of rabbit-fencing his demesne, or killing down a greater number of rabbits; nor do I think there was any evidence that the defendant "kept" or did anything to keep rabbits on his land in such large numbers, or under such circumstances, or at all as to cause "such further or additional damage" as the jury have found to the amount of £10. There is no evidence of stocking by the defendant. The only evidence as to this, if it can properly be called stocking, is that some years before the defendant became possessed of Warrenscourt, his predecessor, the then owner and occupier, turned loose among the wild rabbits, which for sixty years have burrowed and bred in this demesne of between 400 or 500 acres in extent, two Belgian rabbits, not seen again, and supposed to have died, and twelve wild buck rabbits from other lands; but this took place before defendant was owner or occupier, and the wild rabbits were in the demesne when he acquired it.

Q. B. Div. 1900. BRADY v. WARREN. Johnson, J.

Capturing wild rabbits is not keeping them—it is a lawful means of destroying them, and it does not appear that there is a more effectual means of capturing them. The fact that the defendant trapped for profit, shows it was his interest to trap as many as he could; and, that his motive was profit, in no way affects the question if he was within his lawful right. The offer to allow the plaintiff to retain a half year's rent (£8 15*s.*) out of his arrear due, is of little if any value. The plaintiff was complaining of damage both in the defendant's and his predecessor's time, and both in respect of deer and rabbits—it might have been for peace sake—it was refused, and would not, I think, be an admission, creating liability as to the rabbits, if none existed in law, as I think it did not. In my opinion, the defendant is under no liability to the plaintiff in respect of the rabbits.

Next, as to the deer, this is a wholly different question. The real question of substance for the jury on this part of the case was, whether the deer which did the damage to the plaintiff, of which there is ample evidence, were deer *feræ naturæ*, or the defendant's tame domesticated deer.

For at least sixty years there has been a walled-in deer park of about forty acres in Warrenscourt demesne, in which fallow deer were confined and bred—these were the progenitors of all the deer in Warrenscourt, and there are no other deer in the district. While so enclosed, confined, and bred for many years, these deer were in no sense *feræ naturæ*, they were tame domesticated fallow deer confined in this enclosure, the personal chattels of their owner as much as his sheep and cattle. About fifty years ago some of the deer got out of this enclosere, but were taken and again replaced in it, and so matters continued until about ten or twelve years ago, when the enclosure wall became out of repair, and some of the deer again got out, and instead of being taken and replaced in the enclosure and made secure there as the other deer had been, these deer ever since they got out have been allowed by the defendant's predecessor and the defendant to range in the demesne. Some deer (about twenty), infected with a disease called fluke, of which they are dying off, remain in this enclosure termed the deer-park. The wall of this enclosure is old and out of repair, and breached in four places by large gaps made up in one place

3 feet, and in others 2 feet 9 inches high, obviously not sufficient effectively to confine deer. The wall between the demesne and plaintiff's farm is old and dilapidated, broken down in places, and insufficient to confine in the demesne the deer allowed to range there, from sixty to eighty, or perhaps even more in number. The plaintiff's evidence is—"The boundary wall was kept in repair by the old man, and is now in a reckless condition, and the deer crossed in recent years whenever they liked"; and the plaintiff's grass and crops have been seriously damaged by these deer from Warrenscourt demesne. The evidence whether fallow deer, which are usually kept in parks for ornament or use for food or profit (see Willes, C.J., in *Davies* v. *Powell* (1)), are *feræ naturæ*, or tame and domesticated, the chattel property of their owner, varies with the facts of each particular case. In *Morgan* v. *Lord Abergavenny* (2), where the fallow deer were allowed to range over a park of 900 acres; and in *Forde* v. *Tynte* (3), very precise evidence was given of the elaborate care taken for the identification and keeping of the deer—evidence much more detailed and stronger than that in the present case. But in this case there is evidence that there are no other deer in the district, that these are the progeny of tame and domesticated deer for successive generations through many years—that their habitation is Warrenscourt demesne—some in the deer-park and others ranging in the demesne—there they have bred and still breed—there their fawns are dropped and reared. There is no evidence that any fawn was ever dropped or reared outside the demesne where these deer harbour, and from and to which they habitually stray and return, *ex consuetudine eunt et redeunt* (Brac. lib. 2. 1, pt. 9). Defendant's predecessor while in possession fed them in winter with hay, laurels, and oats, not, as I understand the evidence, as wild deer casually driven from their usual wild resorts by hunger to Warrenscourt in search of food: but as his own deer. The plaintiff stated, and it was not controverted, that the defendant's agent promised that the deer would be kept off him. The duty of the defendant's servant Murphy, called a wood ranger, but who seems to be a sort of keeper, and who has shot the deer is,

(1) Willes, 46, p. 51. (2) 8 C. B. 768. (3) 2 J. & H. 150; 31 L.J. Ch. 177.

Q. B. Div. 1900. BRADY v. WARREN. Johnson, J.

as he says, "to look after and count the deer in the whole place," and accordingly he gives their number according to his estimate inside and outside the deer-park proper, and the defendant has shooting parties in the proper season, attended by Murphy to shoot the deer in the demesne. The deer which did the damage to the plaintiff were watched, and seen time after time to come out of the demesne on to plaintiff's farm, and when driven off always went back to the demesne—their home. These were not wild deer which escaped from confinement and regained their natural liberty—their strain for generations was that of tame fallow deer, not of wild deer *ferœ naturæ*, in which (like wild rabbits), no person has property until he has reduced them into possession, but what Bracton classes under the expression *animalia mansueta*. It was argued that these deer were not so marked as to be identified if they strayed to a distance, as the deer were marked, in *Morgan* v. *Abergavenny* (1), but I do not see how this affects the question now under consideration. Sheep or cattle never marked, or from which the mark has been obliterated by time or weather, stray, and frequently are never recovered by their owner, but they do not thereby lose or change their character of domesticated animals, and in the present case the identical deer which caused the damage to the plaintiff are proved to have habitually come out and returned to their home—the defendant's demesne. I think, therefore, that there was evidence which could not have been withheld from the jury that the deer which caused the damage of which the plaintiff complains, were tame deer, the property of the defendant, the owner and occupier of Warrenscourt demesne, and not animals in any sense wild deer, *ferœ naturæ*, and the findings of the jury in respect of the deer are, in my opinion, right. Whether the defendant chose to allow his deer to range in his demesne, or to be enclosed in his deer-park, it was his duty to keep his deer-park and demesne walls in sufficient repair to keep in his deer, or at all events to take the necessary measures to prevent these animals of his which were his property from straying and trespassing on plaintiff's land. Every person is bound to take care that his beasts do not wander from his own

(1) 8 C. B 768.

land on to his neighbour's land, and if they do he must excuse the trespass if he can, by showing that it was not by his default, or that it was by the default of his neighbour, who was under legal obligation to keep up the fences against his beasts, "for the law bounds every man's property, and is his fence": *Star* v. *Rookesby* (1). The opinion of Marsden, J., in *The Anonymous Case* (2) in Ventris, cited for the defendant, "that if one kept a tame fox which gets loose and grows wild, he that kept him before shall not answer for the damage the fox doeth after he has lost him, and he hath remained in his wild nature," has no application to the present case, in which the deer under consideration never were wild deer, but were, and their progenitors for generations had been, tame and domesticated fallow deer of use for ornament or food of man or profit, and I doubt that this opinion of Marsden, J., is law at the present day. I think a person who keeps a fox keeps him at his peril if he escapes: see *May* v. *Burdett* (3); *Rylands* v. *Fletcher* (4). I therefore think that the verdict and judgment should stand for £102 8*s*., the amount assessed by the jury in respect of the damage to the plaintiff by the deer.

PALLES, C. B.:—

One of the questions argued in this case is interesting. It is, whether Lord Justice Fitz Gibbon should, at the trial, have directed a verdict for the defendant on the claim for trespass of deer, upon the ground that there was no evidence that the deer were tame or "reclaimed."

The action was brought to recover damages for injuries to the plaintiff's crops, caused by deer and rabbits which were alleged to be "kept" by the defendant. The jury found that those animals were the defendant's; and what, to my mind, is the same thing in another form, that they were "kept" by him. They further found that reasonable care to prevent them injuring the plaintiff's farm had not been taken; and they assessed, for the damage caused by the deer, £102 8*s*., and for that by the rabbits, £10. Judgment was entered for the sum of these two amounts; and the

(1) 1 Salk. 335.
(2) 1 Vent. 295.
(3) 9 Q. B. 101, p. 103.
(4) L. R. 2 H. L. 330.

Q. B. Div. 1900. BRADY v. WARREN. Palles, C.B.

present application is to change the verdict, on the ground that there was no evidence of any liability on the defendant, or for a new trial, on the ground that the verdict was against the weight of evidence.

The plaintiff is a tenant in occupation of certain farms, which adjoin Warrenscourt demesne, in the county Cork. The defendant has been, since January, 1898, in occupation of that demesne, which contains between 600 and 700 acres. Within the demesne is a walled enclosure of about 40 acres, called the "Deer Park," but which is not a park in the feudal sense of that term. Fallow deer were kept in this park during the entire time which is covered by the evidence; but up to a date, which is fixed by the defendant as 1893, none of them lived in the demesne outside the park. In that year there appears to have been a breach in the park wall, and in consequence some of the deer escaped into the demesne. Some repairs were effected to the wall of the park, but the deer that had escaped were not brought back into the park. The plaintiff gave evidence that so long as the former owner, Sir Augustus Warren, was in possession of the demesne, that is, till the beginning of the year 1898, its boundary wall was kept in repair by him, by which I suppose is meant that it was so kept as to enclose the deer; but still he says that the trespass of deer upon his farms began about eight years ago. But however this may have been during the possession of Sir Augustus Warren, there is evidence that "in recent years," by which I suppose is meant, during the defendant's occupation of the demesne, the deer crossed the wall whenever they liked. The plaintiff says: "There is no more to prevent trespass of deer from the demesne on my farm than if it was an open street." It is the case of the defendant also that there was not such an enclosure of the deer in the demesne as would have prevented them leaving it had they so desired, and this must be deemed a common fact in the case. But, notwithstanding this, there is a body of evidence, as well in the defendant's as in the plaintiff's case, from which a reasonable inference is that the deer which escaped from the park, instead of straying about the country, and becoming wild, remained in the demesne as their home, in the same way as they would have remained in it, had it been sufficiently enclosed; that they bred there and increased

in numbers; and that when they occasionally left the demesne and went on the plaintiff's lands, they returned to the demesne. The defendant says that about thirty escaped out of the park into the demesne; and he fixes at about sixty (and the plaintiff at from eighty to 100) the number now in the demesne. In addition, many were shot by the defendant and his friends. The defendant was cross-examined as to the absence of straying habits in the deer. He says: "I have heard of deer being seen in the neighbourhood—I cannot say when or where. I heard about a year ago of a deer being seen outside the demesne. I did not look on it as extraordinary. I forget really whose it was. It was not a deer of mine. I do not say who it belonged to: it might be one of my own deer. I really don't know if there are any other deer than mine in the whole district." Murphy, the defendant's wood-ranger, who was examined for him, says:—"They (the deer) go out of the demesne, and miles away. I have known them to go three miles across the townland to Doonisky. I do not know if they came back."

These two passages are the only ones I can find as to straying habits in the deer; and contrasting them, general and unsatisfactory as they are, with the body of testimony, appearing as well in the evidence of the defendant's as of the plaintiff's witnesses, that the deer remained in the demesne, bred there, came from there into the plaintiff's farm, returned there from the plaintiff's farm, and there increased in numbers, I entertain no doubt that the jury might reasonably have arrived at the conclusion that there was, on the part of the deer, by reason of their or their ancestors having been bred in the park, some attraction, or relation in the nature of an attraction, to the demesne, different from that which they had to any other place; that they remained there, usually and almost constantly, as in their home; that their absence from it was occasional, and arising from external causes, such as the existence at times upon the plaintiff's farm of food of a kind which they preferred to that which was then available in the demesne; and that as a rule they returned to the demesne, as soon as they had satisfied the immediate desire which induced them to leave it. The distinction, then, between these deer, as they were in the demesne, and deer, as they would have been in the demesne had it

Q. B. Div. 1900. BRADY v. WARREN. Palles, C.B.

been so enclosed as to prevent them leaving it, is that in the latter case they would have been coerced to remain within it, whatever might be their habit or desire, whereas in the actual case we have to determine they remained there in consequence of habit or desire.

The defendant, of course, admits that he would be answerable for any damage caused by the trespass of the deer which were in the walled park; but he insists that the deer in the demesne outside the park are *ferœ naturæ*, for whose acts he is not responsible; and further, that either there was no evidence at the trial that any of the damage sued for was caused by the park deer, or, if there was, that no distinction was drawn by the learned Lord Justice, in his summing up, as to the defendant's liability in respect of these two classes of animals. No objection, however, to this effect was taken at the trial; and it cannot, I think, be denied that there was evidence for the jury that some of the damage was caused by the park deer. Mr. M'Mullen, a surveyor, examined for the plaintiff, proved that upon the Monday before the trial there was, in the park wall, the appearance of four gaps having been recently filled up; that in one of these, 15 feet wide, the wall had been reduced to 3 feet in height; and that in the three others, of widths of 13 feet, 12 feet, and 9 feet, the wall, as reduced, did not exceed 2 feet, or 2 feet 9 inches. This witness was not cross-examined. The evidence of the plaintiff himself was to the same effect, although not so particular. "The deer park wall," he says, "is broken down; the deer can go in and out at several places." The defendant said that he had seen other breaches since 1893; that they were mended up immediately; that he knew nothing of recent gaps, but that his men had orders to make them up; that a storm would make them. He adds, however, that no deer got out of the park, to his knowledge, since 1893.

It was also proved—which, to my mind, is a matter of great importance—that Sir Augustus Warren fed the deer during the winter with hay, laurels, and oats. This evidence is not very specific as to time; but taking it in the context in which it occurs, it would appear to me that Sir Augustus was, during his time, in the habit of feeding them through the winter. The statement occurs in the portion of the plaintiff's evidence which deals with

the damage sustained. He says that "the deer did £20 damage in 1895; that they trespassed in like manner in 1896, getting heavier every year; that they broke out when they were tired of their own place." Then he says: "In 1897 they were worse again. Sir Augustus fed them through the winter with hay, laurels, and oats. The present man, his son, did not feed them, so far as I know." This would appear to contrast the state of things in Sir Augustus' time, to the end of 1897, with that during the defendant's occupation, since that year.

Lastly, it was proved that the defendant's agent, Mr. Carroll, promised the plaintiff that the deer would be kept off his farm. Carroll was not called to contradict this.

Some statements made by Murphy, the wood-ranger, were relied upon during the argument; but as I have not thought it necessary to take them into consideration in arriving at my conclusion, I do not occupy time by referring to them.

Now, as to the defendant's application to direct a verdict for him, it might be sufficient, without entering on the main subject of controversy, to say that there was abundant evidence from which the jury might assume that a substantial part of the damage was caused by deer which were within the enclosure, and passed out through the breaches in the wall; but as the case has been mainly argued by the plaintiff upon the ground that the defendant was responsible in law for the trespass of the deer in the demesne, as well as of those in the park, and as the jury appear to have assessed as damages the full amount proved by the plaintiff, we could not sustain the verdict if the plaintiff is not correct in his contention as to the defendant's liability. The question then is, was there evidence from which the jury might reasonably arrive at the conclusion that these deer in the demesne were tame; for it is admitted that if they were, there is abundant evidence that they were kept by the defendant.

Is there, then, evidence that they were tame? The reason of the distinction between the right of property in animals which are of a tame and domestic nature, as distinct from *ferœ naturæ*, is elementary. Blackstone states it to be (vol. ii., book ii., chap. I.), because the former "continue perpetually in his occupation,

Q. B. Div. 1900.

BRADY v. WARREN.

Palles, C.B.

and will not stray from his house or person, unless by accident or fraudulent enticement, in either of which cases the owner does not lose his property." This distinction is kept in view in determining whether animals *ferœ naturæ* have been tamed. Bracton's view on this subject is thus translated by Sir Travers Twiss (edit. 1878, vol. i., p. 67): "If wild animals have been tamed, and they by habit go out and return, fly away and fly back, such as *deer*, swans, and sea-fowl, doves, and such like; another rule has been approved, that they are so long considered as ours, as long as they have a disposition to return," *quamdiu habuerint animum revertendi.* "For if they have no disposition to return, they cease to be ours; but they seem to cease to have the disposition to return when they have abandoned the habit of returning": *revertendi autem animum videntur desinere habere cum consuetudinem revertendi desinuerint.* This view, which is taken from the civil law (Gaius, ii. 68; Inst. 2, i. 15), is to be found in all our law books which treat of this subject. It is to be observed of the civil law, that in the passage from Gaius, from which Bracton probably took the words I have read, deer are, as they are in Bracton, specially mentioned as being among the class of animals which may have this habit of going and returning, and by reason of this habit may be subjects of property. The habit there mentioned, however, is of going into and coming back from "the woods": *item cervisque in sylvas ire et redire solent.* The woods referred to were, doubtless, not land in the actual occupation of mankind, as is the plaintiff's farm here, but the wild forests, beyond the resort of man, which would be the natural habitation of such deer if they returned to their original wildness. The habit of going into such woods, although accompanied by a habit of returning, involves more of a desire to become wild again than merely breaking into an adjoining farm and returning from it, as if they permanently remained in the wild forests they would be deemed to have become wild again. No such result would follow from their permanently remaining on the plaintiff's farm.

Further, the fact that deer are more usually domesticated now than they were in feudal times has, for more than a century

and a-half, been recognised as matter of law. In *Davies* v. *Powell*(1) the question was whether deer in an enclosed place were distrainable. Willes, C. J., in contrasting the view which the law took of deer, in the time of Lord Coke, with that then held, says: "Besides, the nature of things is now very much altered, and the reason which is given for the rule fails. Deer were formerly kept only in forests or chases, or such parks as were parks either by grant or prescription, and were considered rather as things of pleasure than of profit; but now they are frequently kept in enclosed grounds which are not properly parks, and are kept principally for the sake of profit, and, therefore, must be considered as other cattle." Again, he adds (2): "When the nature of things changes, the rules of law must change too. When it was holden that deer were not distrainable, it was because they were kept principally for pleasure, and not for profit, and were not sold and turned into money as they are now. But now they are become as much a sort of husbandry as horses, cows, sheep, or any other cattle. Whenever they are so, and it is universally known, it would be ridiculous to say that, when they are kept merely for profit, they are not distrainable as other cattle, though it has been holden that they were not so when they were kept only for pleasure." This principle is recognised and approved of in *Morgan* v. *The Earl of Abergavenny* (3), the judgment in which, prepared by Wilde, C. J., and "in substance assented to" by the entire Court, contains this sentence: "In considering whether the evidence warranted the verdict upon the issue whether the deer were tamed and reclaimed, the observations made by Lord Chief Justice Willes in the case of *Davies* v. *Powell* (1) are deserving of attention. The difference in regard to the mode and object of keeping deer in modern times from that which anciently prevailed, as pointed out by Lord Chief Justice Willes, cannot be overlooked. It is truly stated that ornament and profit are the sole objects for which deer are now ordinarily kept, whether in ancient legal parks, or in the modern enclosures so called, the instances being very rare in which deer in such places are kept and used for sport; indeed, their whole management differing

(1) Willes' Rep., 46, 48. (2) *Ibid.* p. 51. (3) 8 C. B. 768, 793.

Q. B. Div. 1900.

BRADY v. WARREN.

Palles, C.B.

very little, if at all, from that of sheep, or of any other animals kept for profit." To the same effect is the judgment of Lord Hatherley, when Vice-Chancellor, in *Forde* v. *Tynte* (1). In reference to this last-mentioned case, as well as to *Morgan* v. *Abergavenny* (2), it is to be observed that the question in each was not whether the deer in question were or were not property, but was whether they were parcel of the inheritance, or personal property. In determining this question the mode in which the parks were enclosed was immaterial. In the present case, however, the circumstance that the demesne is, to a certain extent, fenced, although not in such a way as to prevent the deer leaving it if they desire, is one that cannot be left out of consideration, as it is evidence on the question whether the deer were under the control of the defendant.

I do not think it necessary to contrast the evidence of the "management" of the deer with that in either of the cases I have last mentioned, as each case of this description must depend upon its individual facts. Here, as in each of the two cases I have referred to, there was evidence of "management" of the deer, and of management of them as the property of the defendant. Therefore, the present case can be well determined on one or other, or both of two separate considerations, viz. :—

(1.) That it is a reasonable inference from the evidence that these deer had the habit of remaining in the demesne, a place of *quasi* captivity, although they had the opportunity of escaping from it, and the habit of returning to it when they occasionally left it for the plaintiff's farm.

(2.) That it is also a reasonable inference from the evidence that they were managed in the same way as other domestic cattle, oxen, sheep, &c., making allowance for the difference of their nature.

Having regard to these considerations, taken in connection with the nature of the animals in question, fallow deer, always easily tameable, and in the present day usually tamed and kept for profit, I entertain no doubt that there was evidence to go to the jury that the deer in the demesne were tame, were under

(1) 2 J. & H. 150; 31 L. J. Ch. 177. (2) 8 C. B. 768.

the defendant's control, in his possession, were *his*, and were kept by him, and that the findings in the affirmative of these questions were in accordance with the weight of the evidence.

The verdict, therefore, on this head of the plaintiff's claim must stand.

The second claim was for trespass by rabbits. As to this there is more difficulty. It is laid down in *Boulston's Case* (1), that "if a man makes cony burrows in his own land, which increase in so great numbers that they destroy his neighbour's land next adjoining, his neighbour cannot have an action on the case against him who makes the said cony burrows"; and the reason is given, "for as soon as the conies go on his neighbour's land he may kill them, for they are *ferœ naturæ*, and he who makes the cony burrows has no property in them." To the same effect is *Hinsley* v. *Wilkinson* (2), and *Boulston's Case* (1) is cited with approval by Bayley, J., in delivering the judgment of the full Court of King's Bench, in *Hannam* v. *Mockett* (3); and is admitted by both parties to be now law. Accordingly, the Lord Justice directed the jury that the defendant was not answerable for any amount of damage caused by the natural and reasonably to be expected trespass of rabbits, having regard to the existence of rabbits in the locality. To this direction no objection was taken. The Lord Justice, however, proceeded to leave to the jury the question whether the defendant *kept* rabbits upon his land in such *extra* numbers, or under such circumstances, as to cause *further or additional* damage; but only so far as he could have prevented it by reasonable fencing, or by killing a larger number, or by other reasonable means; and he further told the jury that, before they could find for the plaintiff, they should be satisfied that there was a use of the rabbits by the defendant as his property, which would impose upon him the duty of reasonable care not to injure his neighbour in the mode of using his own property. This direction I regard as having been given, not as expressing the Lord Justice's own final or deliberate opinion of the law, but to render unnecessary a second trial, in the event of the Court holding that the action lay.

(1) Rep., Part V., 104 b; more fully Cro. Eliz. 547 (21).

(2) Cro. Car. 387.

(3) 2 B. & C. 934, 939.

Q. B. Div. 1900.

BRADY v. WARREN.

Palles, C.B.

The question is, was there evidence to go to the jury that the defendant was liable for any part of the trespass of the rabbits? The principal evidence upon which this question was left, and the only evidence relied upon during the argument in support of it, is compendiously summed up by the Lord Justice as that "of stocking, of trapping for profit, and of the offer of compensation by Mr. Carroll." No other portion of the evidence has been relied on for the plaintiff.

The following is the substance of the evidence thus referred to: Sir Augustus Warren, who was in the habit of selling the rabbits, brought two Belgian rabbits there, and subsequently some years since, brought some bucks to the demesne, let them into the burrows, and reared a great quantity from them. Shortly afterwards the plaintiff commenced to complain of their trespass, and he continued to do so till this action was brought. When the defendant succeeded Sir Augustus in the possession, he continued to kill, trap, and sell rabbits for profit. As to the number sold by him, he stated in answer to questions of the Lord Justice, that the most he sold in any year was 4000, that he sold that number five years ago, when he was managing for his father, that in 1899 he sold about 3000, and in 1898 less. Mr. Carroll, the defendant's agent, offered to allow the plaintiff half a year's rent, £8 15*s.*, for the damage caused by the rabbits.

In determining whether the facts I have stated amount to evidence of liability in the defendant, I desire to confine myself to the exact question in issue. I purposely refrain from considering whether an action would lie against a person who by his own act, such as *bringing* rabbits on his land, caused them to increase to such an unreasonable extent that his neighbour's lands are thereby injured to a greater extent than they would have been, had the natural growth of the wild rabbits already on the lands not been effected. No actual decision on that question has been cited. In *Hilton* v. *Greene* (1), *Birkbeck* v. *Paget* (2), *Paget* v. *Birkbeck* (3), and *Farrer* v. *Nelson* (4), the question was the liability to the occupier of the land of a person entitled to a right of shooting over that occupier's land, not his liability to an adjoining occupier.

(1) 2 F. & F. 821.
(2) 31 Beav. 403.
(3) 3 F. & F. 683.
(4) 15 Q. B. D. 258.

In all such cases the question must be whether the act of bringing the animals on the land is authorised by the right granted to the defendant, and necessarily is wholly different from that between adjoining occupiers which does not depend on grant. Undoubtedly, however, in *Farrer* v. *Nelson* (1), Pollock, B., expressed the opinion, apparently with the assent of Day, J., that such an action as I have mentioned will lie. "I will first deal," he says, "with the question whether an action can be brought by a neighbour against any person who collects animals upon his land so as to injure the crops of his neighbour; and I should say that, beyond doubt, such an action would lie, and that the rule upon which it would be founded would be not so much negligence as upon an infraction of the rule *sic utere tuo ut alienum non laedas*." I cannot say that I think we can gain much assistance from this maxim, as to bring any case within it you must first show that the act complained of does "injury" (in a legal sense) to the neighbour: *damnum sine injuria* would not be sufficient, and to ascertain whether the act is an "*injuria*," it must be shown that it was a breach of an obligation due by the defendant to the neighbour, and thus we come back to the question which it was proposed to solve (2). Further, I am of opinion that the proposition can hardly have been intended to be taken in its broad generality or otherwise than subject to some restriction in respect of the occupier's reasonable use of his own lands. For the purpose of this judgment, however, I assume it to be law, and I further assume that which I think may well be subject to some doubt, that notwithstanding *Boulston's Case* (3), rabbits are "animals" within the rule, and that the proved acts of Sir Augustus Warren amounted to a bringing of the rabbits upon the land. Further, I assume that which I also gravely doubt, that there was evidence of the rabbits being in such extra numbers (over and above that which would have existed but for the introduction of the bucks), as to cause damage additional to that which would have been caused by the "natural and reasonably to be expected trespass" of rabbits whose breeding had not been interfered with by Sir Augustus. Making all these

(1) 15 Q. B. D. 258.
(2) El. Bl. & El. 643.
(3) Rep., Part V., 104 b; more fully, Cr. Eliz. 547 (21).

Q. B. Div. 1900. BRADY v. WARREN. Palles, C. B.

assumptions, I come to the one single proposition on which I decide this portion of the case. It is this: that although these assumed circumstances *might be* sufficient to maintain the action, had it been brought against Sir Augustus Warren in his lifetime, he is not the defendant here. The action is against a person who, subsequently to the rabbits being turned on, became entitled to the possession of the land. When the defendant so became entitled, the rabbits which had been turned on by Sir Augustus, and their progeny, were wild. It is not proved that the defendant himself brought rabbits to the land, or personally interfered in relation to their being brought by Sir Augustus. If, therefore, the bringing of them is to render him liable, he can be so liable only, *as a subsequent occupier* of land which continued to be affected by a wrongful act of Sir Augustus. I cannot, however, see that that act of Sir Augustus can, in law, impose upon the land a *quasi* servitude, rendering its occupier liable in respect of wild rabbits, under circumstances in which no liability is imposed upon him by the common law. The case does not appear to me to be analogous to that of a continuing nuisance as it might have been had the rabbits been tame when the defendant came into possession. Had they then been tame, there would have been evidence that he "kept" them, and the case would have been different.

The two matters left to the consideration of the jury by the learned Lord Justice, in addition to the stocking or turning on of the rabbits by Sir Augustus, were the defendant's user of them for profit by selling them, and the agent's offer to allow half a year's rent for the damage. But if the rabbits were on the defendant's land under such circumstances that the defendant was not liable for their trespass, then whilst he as occupier of the land was entitled to trap or shoot on that land as many as he thought proper, he was not under any obligation to the plaintiff, the adjoining occupier, to do so. The number that he trapped was a matter entirely for himself. The trapping of rabbits on the plaintiff's land is out of the case, as this was done by his license. As to the agent's offer to allow money for the damage, had there been *any* evidence of the liability of the defendant, sufficient to be left to the jury, this offer might legitimately be considered as

adding to the *weight* of it; but it cannot, in my opinion, *per se*, amount to evidence of a liability which is negatived by all the other facts in evidence.

I am therefore of opinion that the plaintiff's only remedy for the trespass was to kill the trespassing rabbits, and that the verdict, so far as it relates to this cause of action, should be entered for the defendant.

As to the costs, the necessity of bringing an action in the High Court arose from the trespass by the deer. The liability to the damage by the rabbits, had there been no question as to the deer, if insisted upon at all, which upon the evidence appears problematical, might, and I believe would have been, disposed of in the County Court. I am therefore of opinion that the plaintiff ought to have the general costs of the suit, including the costs of this motion, deducting thereout any additional costs caused by his introduction of the claim in respect of the rabbits; but that he should pay the defendant any costs necessarily incurred by him which would not have been incurred had the plaintiff's claim been confined to the trespass of the deer.

Solicitor for the plaintiff: *Michael Purcell.*
Solicitors for the defendant: *W. G. Lane & Co.*

J. I.

Appeal.
1898.
Nov. 10, 11.
1899.
Jan. 16.

HANNA *v.* POLLOCK (1).

(1897. No. 2956.—Ex. Div.)

Watercourse — Artificial watercourse — Enjoyment of, for twenty years— Tenants of common landlord—Prescription Act, 2 & 3 Wm. 4, c. 71.

Prior to 1894 (when they purchased their holdings through the Irish Land Commission) H. and P. were tenants of adjoining farms on the same estate. In 1861 the predecessor of H., for the better drainage of his holding constructed a drain through his lands to a neighbouring river, and at the same time a weir was constructed on the course of this drain, and a "carry" or conduit, by which some of the water was led in a different direction along H.'s side of the boundary between the two farms to the public road, and thence along that road (which ran through P.'s holding) supplying a tank on P.'s holding with water, and ultimately finding its way to the river at a point lower down its course. In 1896 H. altered the drainage of his lands and removed the "carry," so that it no longer supplied P.'s tank. P. entered on H.'s land and restored it. H. sued for damages for trespass, obstruction of the watercourse, and for flooding the lands. P. justified under an alleged lost grant, and by prescription. At the trial the jury found a lost grant, but found there was no flow of water as of right prior to the drainage operations in 1861, and the Judge directed a verdict for the defendant:—

Held, by Fitz Gibbon and Walker, L.JJ. (*dissentiente* Holmes, L.J.), affirming the majority of the Queen's Bench Division, that the drain was merely an artificial drain, not of a permanent character, but open to alteration or removal at H.'s pleasure, and that P.'s enjoyment must be regarded as permissive only.

Held also by Walker, L.J., and Holmes, L.J., that a lost grant of an easement may be presumed from enjoyment for twenty years between two tenants, whether holding under the same landlord or not.

Held by Fitz Gibbon, L.J., following *Bright* v. *Walker* (1 C. M. & R. 211), and *Wilson* v. *Stanley* (12 I. C. L. R. 345), that since the Prescription Act a fictitious grant cannot be presumed as the foundation of a right upon less than forty years' user by a termor against a termor.

The facts of this case are reported in the Court below ([1898] 2 I. R. 532), with a plan, showing the line of the watercourse.

(1) Before Fitz Gibbon, Walker, and Holmes, L.JJ.

The defendants appealed.

Appeal. 1898.

HANNA v. POLLOCK.

O'Shaughnessy, Q.C., Campbell, Q.C., and *William Moore,* for the appellant.

Serjeant Dodd, Wylie, Q.C., and *R. F. Todd,* for the respondents.

The arguments were substantially the same as in the Court below.

FITZ GIBBON, L. J. :— 1899. Jan. 16.

This case being reported ([1898] 2 I. R. 532), I shall refer to that report with its map, and avoid, as far as I can, repeating what appears therein.

We propose to consider two questions—(1), the question of fact,—Whether there was sufficient evidence to sustain the first and second findings of the jury, of a lost grant by M'Curdy Hamilton to James Pollock of liberty to erect a "carry" or "weir," and to divert a portion of the water flowing to that "carry" to the defendant's farm? (2), the question of law,—Whether, the period of user being less than forty years, and the parties to the alleged grant being termors only, and there being no evidence except of user to sustain the plea, the Judge was at liberty to leave the question of lost grant to the jury? In other words, is the judgment in *Bright* v. *Walker* (1), as hitherto understood, and as applied to the provisions of the Prescription Act, relating to twenty years' user, law or not?

If the question of fact be decided in favour of the plaintiff, who is the owner of the alleged servient tenement, the discussion of the question of law becomes, as it did in *Timmons* v. *Hewitt* (2), unnecessary to the decision of the case; and though my colleagues think it right for us to express our opinions upon it, those opinions cannot bind this Court, or even ourselves, in any future case.

I am clearly of opinion that there is no sufficient evidence in fact to found the presumption of a lost grant. The presumption

(1) 1 C. M. & R. 211. (2) 22 L. R. Ir. 627.

Appeal. 1899.

HANNA v. POLLOCK.

Fitz Gibbon, L.J.

must always be founded upon intention inferred from circumstances, from user, and from conduct. Upon the undisputed facts of this case, I find it impossible to put into black and white any form of instrument sufficient to confer the right claimed by the defendants, which any person with the lowest measure of regard for self-interest could consent to execute, and in the evidence for the defendants, which includes that of the supposed grantee, James Pollock, I find sufficient proof both of what the transaction upon which it is now sought to found the fiction of a grant really was, and also that neither party has at any time dealt with the water in question in the way which would be essential to constitute such a user as of right as would be necessary to sustain the finding of the jury.

In discussing the case I shall fully accept the position which *Angus* v. *Dalton* (1) has, perhaps, advanced farther than any other case, that not only is belief in the existence of the presumed grant unnecessary, but that even where its existence is negatived, the jury not only may, but ought to, give to user as of right for the prescribed period the full effect of an actual grant, wherever the presumption can be lawfully made. In dealing with the facts, I shall rely only on the defendants' evidence, or on what is admitted.

In short, I shall discuss the case upon the most favourable assumption for the defendants, as indeed I am bound to do when the jury have found in their favour.

Speaking generally, I concur upon the question of fact, with Andrews, J., but it is my duty to give a detailed judgment of my own.

I take the evidence, as far as I can, in order of date, and I refer to the map printed in the Report. The oldest witness was the defendant, James Pollock, aged 89, who knows the place all his life. John Taylor, John Kerr, and Thomas M'Kennon also knew it before 1861. These witnesses prove that the water in dispute rises north of the Ballycastle road in lands now belonging to the plaintiff, called Whitegate or Chequer Hall. The land, both above and below the road, has a slight fall towards the

(1) 6 App. Cas. 740.

Killaggan water, a natural stream, and the natural outlet for the water from the land above the road.

At the commencement of the evidence, what is now the county road to Clogh Mills was an "old avenue" running at an angle from the Ballycastle road past the defendants' farm. At that time, as now, water accumulated above the Ballycastle road, on the plaintiff's lands. Until 1861, this water made its way to the Killaggan water by two courses, neither of which was a natural stream. A pipe from C on the map, carried most of the water which flowed in any defined course down to the Killaggan water. James Pollock, Taylor, Kerr, and M'Kennon all agree that before M'Curdy Hamilton, the presumed grantor, altered the flow of the water, a portion of it came straight down from Whitegate past Pollock's by a shough at the left-hand side of the Clogh Mills road to N, where it was taken under the road or "avenue" to Pollock's house through a hole which he made, and for which the county afterwards substituted a culvert. All the water running through the pipe from C, reached the Killaggan water above a scutch mill now belonging to John Mullen, but the water which ran down the Clogh Mills road past Pollock's house fell into the Killaggan water below the mill. The land both above and below the Ballycastle road, east of the Clogh Mills road, belonged to the plaintiff's predecessor, and from its low-lying and boggy character it needed drainage and improvement of the outlet for the water.

In this state of facts M'Curdy Hamilton, in or about 1861, made the water-course, which is now the subject of dispute, from B, about half-way between C and the intersection of the roads, past the point where the carry in dispute was put up, and thence on to the Killaggan water at S, above the scutch mill.

This water-course was wide and shallow; its purpose was the drainage of Hamilton's lands; and it discharges more water from the lands above the road than had previously found its way either through the pipe from C, or down the shough along the road.

The main case which the defendants tried to make in evidence at the trial was that, before M'Curdy Hamilton's operations, water ran down to the site of the carry, and from that site to the Clogh Mills road, and thence to Pollock's house. In short, the

Appeal. 1899. HANNA v. POLLOCK. Fitz Gibbon, L.J.

defendants tried to prove that the carry was put up originally in order to leave them water to which they were entitled, and of which they had a user as of right. This case was met, not only by evidence, part of which was given by witnesses produced for the defendants, that no water ever came to the site of the carry until the new cut made by M'Curdy Hamilton brought it there, but by the fact, admitted by James Pollock himself, that "the water had to be taken a wee bit up hill" from the new course to the Clogh Mills road by making the "carry" in question.

The jury found, upon ample evidence, against the defendants, that "before the drainage operations of 1861, *no water* flowed as of right from the site of the carry to the Clogh Mills road and thence to the defendant's farm." Upon the question whether there is any evidence to sustain the presumption of a grant, this finding appears to me to be of vital importance.

I take the transaction of 1861 from the evidence of the defendant James Pollock, who was a party to it. After proving that he fetched water to the hole which he made under the Clogh Mills road before the carry was made, but discounting that evidence by the finding that this water was not brought as of right from the site of the carry—which implies that it came down the side of the road—he says, "M'Curdy Hamilton was draining, and he and I made an agreement to send the whole water this road," meaning down from B.

The map and the levels show that the effect of opening the drain from B was to carry the water that previously went down the pipes from C eastwards to the upper end of the new drain at B and also possibly to carry some of the water which previously ran down the Clogh Mills road westwards to the same point. Kerr worked for Hamilton in making the new course. I accept his evidence, that Hamilton told him "that James Pollock was to be left his water," but he describes the operation in these words:—"M'Curdy Hamilton drained the property. I worked at the drains. When we commenced the drainage works we deepened the course from B. That course was not previously carrying any water. When we deepened it, it could carry water away, and then we put up the carry that Pollock might have the water he had been in the habit of getting. We sunk and cleaned out the

drain: we did that to drain the land. I put up the carry to bring to Pollock the portion of water that he was in the habit of getting. The carry was there twenty-five years ago in the same place in which it is now."

Bearing in mind that the jury have found that until these operations no water flowed as of right to the carry and thence to the defendant's farm, and the evidence that the water which previously reached Pollock's farm ran down beside the Clogh Mills road, and that such water, and such water only, fell into the Killaggan water below the scutch mill, neither Hamilton nor Pollock can have had any right in 1861 to divert any additional water from the scutch mill; Pollock could not get, and Hamilton could not grant, any right to water diverted from the pipe at C to the new course from B.

I shall presently refer to the evidence of Mullen and of the defendant Nathaniel Pollock as to the diversion of water from the mill. Pollock's operations were, in the words of the jury, "drainage operations." Their object was to facilitate the discharge of surface water from Hamilton's lands above the road through Hamilton's lands below the road. Hamilton, in the words of the plaintiff, "did not want the water himself." Hamilton and Pollock "were friends"; nothing could be more natural than that Pollock should be allowed to take water from the carry to the pipe under the road; but it would be most unnatural and inconsistent with the object of the whole business, if Hamilton were to grant to Pollock a right which would involve the inability ever to deepen his drain, or ever to alter or improve the escape of the drainage water from his own lands. Besides, neither he nor Pollock could divert to Pollock's farm any water which previously fell into the Killaggan water above the scutch mill. The carry in question has been dignified with the name of a weir. James Pollock graphically says "at first it wasn't very high; it was a row of sods, and a wee row of stones high" across a shallow shough which had a fall of only "about one inch" in its entire length of 500 feet. It appears to me to be absolutely unreasonable to impute to Hamilton any intention to grant, or to Pollock any intention to acquire, any right to water lying in this new course which would not be subject to Hamilton's retention of his right to

Appeal. 1899. HANNA v. POLLOCK. Fitz Gibbon, L.J.

do everything from time to time that might be reasonable for the drainage of his lands—always remembering that the jury have found that Pollock had no user as of right of any water at the *locus in quo* before the "drainage operations" of 1861. A fair way to test the reasonableness of presuming a grant is to take the facts as they stood in 1861 as instructions for the preparation of a deed to confer the right now presumed.

Is it conceivable that Hamilton would impose upon himself and his successors an obligation to maintain the bottom of his shough and the top of the "wee row" of sods and stones always at their then level, and never to improve or deepen his own drains? The only inference which I can draw from the facts is that he might give to Pollock liberty to carry to his farm any drainage water which Hamilton "did not want," and which could be taken without the knowledge or with the permission of the owner of the scutch mill, reserving Hamilton's power to drain his own land in a reasonable manner from time to time. The acts now complained of consist only of scouring the water-course for the purpose of drainage, and of removing the "carry" in the course of so doing. It is proved that Pollock's supply of water could have been restored by similarly scouring the drain from the carry to his house: in short, by merely lowering the level of both drains alike. As the plaintiff puts it:—"When I cleaned out the shough, the water would all go to the Killaggan river, unless the defendants cleaned out their own fence."

The defendants' engineer, Mr. Pinkerton, swears that the defendants' drains "could be altered for £2, so as to give them all the water and not flood the plaintiff's land."

The way in which the defendants' met this state of facts appears to me to show conclusively that the right claimed has no legal existence. Nathaniel Pollock says:—"When the plaintiff sank the stream from the carry to the river, and took the carry away, I challenged him for it. He told me to sink the shough three inches. I was threatened by Mullen with law if I did." And *he didn't.* Mullen swore that when he heard, seventeen years ago, of the Pollocks taking the water, he went up and spoke to them and drew their attention to it, and said he would not let them take it unless they would turn it to his mill again; they promised to

return it, but never did, and recently he served a written notice on the defendants, which is in evidence, to send in the water that they had deprived him of for the last seventeen years, and threatening proceedings if they failed to do so. With the finding of the jury that there was no flow of water as of right from the carry before 1861, and the defendant's practical admission that he did not deepen his own alleged watercourse even by three inches, because the mill-owner objected, I find it impossible to conceive a grant which could confer an absolute right to the flow of water through the course in question, it being indisputably clear that to sustain the findings, that grant must have imposed an obligation on the grantor not to carry his drainage operations any further, and for ever thereafter during his term to maintain the bottom of the shough which he made in 1861 at the same level at which it was originally constructed, and all this for the sole purpose of voluntarily giving to his neighbour a right, which the jury have found that he did not previously possess, of supplying his farm with water from a new cut which the grantor made for the more effective drainage of his own land, and therefore primarily for his own benefit. The whole doctrine of presumed grant rests upon the desire of the law to create a legal foundation for the long-continued enjoyment, *as of right*, of advantages which are *prima facie* inexplicable in the absence of legal title. In cases such as this, where the grant is admittedly a fiction, it is all the more incumbent on the Judge to see, before the question is left to the jury, that the circumstances and character of the user import that it has been "*as of right.*" It appears to me, in the present case, that the evidence is inconsistent with right, and that the user is consistent only with permission to enjoy what the supposed grantor did not want, if and so long as that user might be consistent with the rights of third parties, and also with the grantor's right to use his own property from time to time in a reasonable manner. Such a user never could have been as of right in its inception; it could never acquire during its continuance any higher than a permissive character, and it therefore never could be, or become, a foundation for the presumption of a grant.

I shall refer very shortly to the cases which establish the distinction, which common sense indicates, between the cases of artificial

Appeal. 1899.

HANNA v. POLLOCK.

Fitz Gibbon, L.J.

and of natural water-courses. *Arkwright* v. *Gell* (1) shows that user can confer no right of action against the owners of an artificial water-course made for a particular purpose, when that purpose was known to the person who used the water, and when the circumstances showed that its flow was attributable to the exigencies of those who constructed it. It was there held that from such circumstances no presumption of a grant could arise. In *Wood* v. *Waud* (2) more than sixty years enjoyment was held to give no right of action for diversion of the water of an artificial course, where the flow, from the nature of the case, appeared to depend upon temporary circumstances, and where the interruption was by a person standing in the position of a grantor. *Greatrex* v. *Hayward* (3) is almost identical with the present case, and it decided that the enjoyment for twenty years of a flow of water from a drain made for the purpose of agricultural improvement did not give a right to the neighbour to preclude the proprietor from altering the level of his drain for the improvement of his land, although, in that case as in this, the jury had found in favour of the right. This principle was sanctioned, and *Wood* v. *Waud* (2) was expressly affirmed, by the Privy Council in *Rameshur Pershad Narain Singh* v. *Koonj Bahari Puttuk* (4), although in that case it was found, upon the facts, that the circumstances fairly supported the presumption of a legal right to surplus water, subject to the right of the defendant to irrigate his own lands, and to take by proper channels and other proper means, so much of the water as might be proper and requisite for such purpose.

Consistently with this last case, the only right which the defendants in the present case could have, would be a right to such water, not exceeding the flow since 1861, as they could take by adapting their carry and drain to the plaintiff's drainage works as altered from time to time. But such a right would not sustain the defence, first because there is no evidence that the plaintiff's scouring of his drains has been in any way unreasonable or improper as a drainage operation, and secondly because the

(1) 5 M. & W. 203.
(2) 3 Exch. 748.
(3) 8 Exch. 391.
(4) 4 App. Cas. 121.

defendants did not make the changes in their carry and drain which would have continued the flow of water as it was before the plaintiff scoured his drain, because they would not face the opposition of the owner of the scutch mill. They cannot make the plaintiff answerable for that.

In my opinion, therefore, upon the third finding of the jury, there was no sufficient evidence to sustain the first and second findings, the plaintiff is entitled to judgment, and the Appeal ought to be dismissed with costs.

Upon the question of law, namely, whether since the Prescription Act, a fictitious grant can be presumed as the foundation of a right upon less than forty years user by a termor against a termor, the Queen's Bench was under the impression that there were Irish decisions that such a right could be so established when the fee was not bound. I have read all the Irish cases with care, and it is my impression that, in the High Court, the question has never been *decided* in the affirmative, although opinions to that effect have been expressed by some Judges. It certainly has not been decided by this Court, and in *Timmons* v. *Hewitt* (1), when the question was raised before a larger Court than the present, consisting of the Lord Chancellor, Barry and Naish, L.JJ., and myself, the expression of any opinion upon it was declined, because, in that case as in this, the decision went against the claimant upon the question of fact, and the question of law therefore became immaterial to the judgment. I believe that we ought to take the same course now, but my colleagues think that we ought to express our opinions, and I do so in deference to them, though such expression is unnecessary to our decision, and consequently is not binding either on the Court or on ourselves.

I take the Irish cases in order of date. *Deeble* v. *Linehan* (2) was decided on the 9th June, 1860. The acts were done and the action was commenced before the 1st January, 1859, the day upon which 21 & 22 Vict. c. 42 extended the Prescription Act to Ireland. It is remarkable that whenever *Deeble* v. *Linehan* (2) has been relied on in the High Court as an authority for the

(1) 22 L. R. Ir. 627. (2) 12 I. C. L. R. 1.

Appeal. 1899.

HANNA v. POLLOCK.

Fitz Gibbon, L. J.

proposition that one termor can prescribe against another, it has not been observed that the dates prevent its application to *Bright* v. *Walker* (1) or to the Prescription Act, and therefore that it can be no authority upon the point now at issue, viz. the effect of that Act upon the presumption of a lost grant from twenty years user. The case is open to other important observations. Although the servient tenement was held under a bishop's lease, the evidence going to establish the right against the middle estate was extremely strong as circumstantial evidence of a grant in fact. The original watercourse was granted by deed for the purposes of a mill, which had been worked by means of it for 144 years. The watercourse in question was only a substitution for a small part of the granted stream, necessitated by an alteration of a public road for which the owner of the servient tenement had received compensation. Evidence was given, and was held sufficient, of acquiescence by the servient termor; the Court held, under the circumstances, that a grant might be presumed, though not found to have been actually executed. But for the existence of the fee in the bishop, the case could go no farther than *Angus* v. *Dalton* (2) upon the law, and upon the facts it was an incomparably stronger case for maintaining the right. If it were generally applicable to all cases of twenty years' user by termor against termor, I could not reconcile it with *Hanks* v. *Cribbin* (3) decided by the Common Pleas in 1857. To treat it as an authority for prescribing for an easement from user over land not held in fee, makes it inconsistent with principle, and with several of the English judgments to which my colleagues will refer. The case becomes completely reconcileable with principle and authority, if it be assumed that the remote reversion of the bishop was treated as unaffected, or as bound by whatever bound the substantial interest, practically the fee, of the middleman.

In *Deeble* v. *Linehan* (4) *Bright* v. *Walker* (1) was cited only to show that the presumption of a lost grant did not involve belief in its actual execution, but the dates prevented it from deciding anything upon the effect of the Prescription Act as laid down in *Bright* v. *Walker* (1).

(1) 1 C. M. & R. 211.
(2) 6 App. Cas. 740.
(3) 7 I. C. L. R. 489.
(4) 12 I. C. L. R. 1.

Wilson v. *Stanley* (1), decided by the Exchequer in 1861 and reported in the same volume, *was* a decision on the Prescription Act, and if Pigot, C.B. rightly interpreted *Bright* v. *Walker* (2), it rules this case. Wilson sued for obstructing a mill-stream which ran across the defendant's lands. Under a lease of 1775 which expired in 1840, under which the plaintiff's and defendant's lands were held, the mill-stream was made and enjoyed for more than forty years. The holding being divided, in 1841 the defendants' lands, with the mill-stream then running across them, were leased for twenty-one years to the defendant's predecessor. In 1843, the mill, with the right to the water, was demised for two lives or thirty-one years to the plaintiff's predecessor, and the stream was enjoyed without interruption until 1860. At the expiration of the lease of 1775, and at the dates of the leases of 1841 and 1843, the reversion was held by a tenant for life. There had been actual user for more than forty years before the action. The plaintiff contended that this forty years' enjoyment gave an absolute right under the Prescription Act, sect. 2; or at all events that there had been twenty years' enjoyment, which but for the Prescription Act would have raised the presumption of a grant; that the Prescription Act could not be held to have superseded the Common Law; and that *Bright* v. *Walker* (2) was inconsistent with *Wright* v. *Williams* (3), and would lead to great injustice, especially in Ireland. Pigot, C.B. said as to the Prescription Act:—

> "Two results follow from its enactments, according to *Bright* v. *Walker* (2), viz. 1. Presumptive title founded on a presumed grant, cannot now be established at all by proof of long uninterrupted enjoyment alone. 2. The prescriptive title which the statute has given the means of establishing, can only be applied where enjoyment has been *such as to bind all estates*, comprising the whole fee-simple, in the servient tenement."

He says it might have been consistent with the Act to hold prescription should be applied where the enjoyment was had for the periods defined in the earlier sections, and where the prescription was not negatived by other means than by showing commencement of enjoyment within legal memory, but that where

(1) 12 I. C. L. R. 345. (2) 1 C. M. & R. 211. (3) 1 M. & W. 77.

Appeal. 1899. HANNA v. POLLOCK. Fitz Gibbon, L. J.

prescription was not applicable (as where all estates in the land were not bound), a presumption of a legal origin of the enjoyment in a grant for some competent party might still be made against the party against whom, before the Act, such presumption would have had the sanction of constant practice and established user. But he says:—

> "It was however *otherwise held* in the exposition of the statute given in the judgment in *Bright* v. *Walker* (1)."

He refers to that decision, as never having been expressly over-ruled or even mentioned with disapprobation for more than a quarter of a century, and he held himself, in a Court of co-ordinate jurisdiction, bound by it, notwithstanding its special importance in Ireland, where

> "It was most important that rights to water, as well as other incorporeal privileges, should be capable of being proved by evidence of long enjoyment, not only against the owners of the fee in possession, but against owners of derivative interests, which, in some instances, are of little less value than the fee."

He said, equally distinctly, that the decision in *Bright* v. *Walker* (1) would have precluded the Judge at the trial from leaving it to the jury to presume a grant,

> "For, besides the long enjoyment, there was *no other circumstance* presented by the evidence, from which an inference could be drawn that a grant had been made."

That is the state of the evidence here, and I follow Pigot, C.B., as to its effect.

As to reconciling *Wright* v. *Williams* (2) with *Bright* v. *Walker* (1), he says that the only distinction which he could see between these cases was that in *Bright* v. *Walker* (1) the enjoyment had been for less than forty years, though for more than twenty, and that in *Wright* v. *Williams* (2) it had continued for more than forty years; that the latter case therefore was decided upon the forty years' enjoyment and the language of the Act, especially in sect. 8, relating to an enjoyment for that period.

(1) 1 C. M. & R. 211. (2) 1 M. & W. 77.

In this he anticipated the decision in *Beggan* v. *M'Donald* (1), and he limited the effect of *Bright* v. *Walker* (2) to the twenty years enjoyment only; and as to enjoyment for the shorter period, he accepted the judgment of Parke, B., as law.

Beggan v. *M'Donald* (1) was decided by the Exchequer in 1877. In that case there were two counts for trespass *quare clausum fregit*. The defendant justified by user as of right for twenty years, and he also justified, in a distinct plea, by like user for forty years. The plaintiff's land had been held under a lease for more than forty years before the action, for a term still subsisting. There was no evidence of acquiescence on the part of the landlord, and the defendant and his predecessors were termors under another landlord. The jury found for the defendants on both pleas. Dowse, B., held that both the landlord and tenant had the burthen imposed on them by the forty years user, the tenant during his lease, and the landlord, unless he put it off under sect. 8, within three years after the expiration of the lease. He says (3):—

> "*Bright* v. *Walker* (2) has been often questioned, but never overruled. This Court has no authority to overrule it, and, even if I were sitting in a Court of Error, I would find great difficulty in overruling a judgment that, unsatisfactory as it may be in part, has so much to be said in its favour. That case *dealt only with a twenty years user*, and so far as it laid down the law applicable to that period of enjoyment, I consider myself bound by its decision. . . . To a case of twenty years' enjoyment, the reasoning of *Bright* v. *Walker* (2) distinctly applies. The 8th section has nothing to do with this part of the case. If we were to hold here that the landlord is bound, he is bound without any possible way of freeing himself from the obligation, and this anomalous state of the law would be established, that the landlord could free himself when he was bound for forty years, and he could not free himself when he was bound for twenty years. It is clear the landlord is not bound at all. From whence, to quote *Bright* v. *Walker* (2), we are led to conclude that an enjoyment of twenty years, if it give not a good title against all, *gives no good title at all.*"

Every Judge, both in the Exchequer and in the Court of Appeal, treated *Bright* v. *Walker* (2) as concluding the defendant

(1) 2 L. R. Ir. 560. (2) 1 C. M. & R. 211. (3) I. R. 11 C. L. 362.

Appeal. 1899. HANNA v. POLLOCK. Fitz Gibbon, L.J.

upon the plea of twenty years' user—the only user which exists here; but Dowse, B., Palles, C.B., and the whole Court of Appeal upheld the defence upon the forty years' user, upon the difference of the provisions of the Prescription Act as to the two periods. Deasy, B., and Fitzgerald, B., decided in favour of the plaintiff upon both pleas. Deasy, B., applied the doctrine of *Bright* v. *Walker* (1) alike to both periods, and therefore dissented from *Wright* v. *Williams* (2). Fitzgerald, B. distinguished the effect of the enjoyment for the two periods; and as to the twenty years, Palles, C. B., adopted his judgment, though he dissented from the ground of "inconclusiveness," on which Fitzgerald, B., decided against the right on the forty years' enjoyment. Fitzgerald B. says:—

> "In cases under the 2nd section, if the evidence of twenty years' enjoyment be such as, under the circumstances of the case, could not before the statute have been left to the jury *as evidence of title affecting the fee*, neither can it be since the statute. . . . The jury was rightly told that the evidence of enjoyment could not, under the circumstances of the case" (*i.e.*, in the absence of acquiescence), "be left to them as evidence of title affecting the fee, and that being so, the plea of twenty years' enjoyment under the statute was not maintained."

In this Palles, C.B., Dowse, B., and this Court all agreed. Palles, C.B., says:—

> "We all agree that the object of the statute was to shorten the time of prescription, and that the periods mentioned in it are to be deemed new times of prescription. We also agree that an enjoyment, to create a title against a particular estate in the servient tenement should be, first, such as to be *capable* of giving a good title against the whole fee-simple estate, and secondly, such as will in fact give that title without any further act done by the owner of the dominant tenement, provided the reversioner in the servient tenement shall not resist within three years from the determination of the lease. The sole difference between us is this, my brothers Deasy and Fitzgerald are of opinion that the easement cannot exist at all, unless it binds the fee *absolutely and in every event*. My brother Dowse and myself are of opinion that an enjoyment, although insufficient to bind the fee in the event of the reversioner resisting within three years, is effectual to bind, and does

(1) 1 C. M. & R. 211. (2) 1 M. & W. 77.

bind, the fee defeasibly, that is, unless and until the reversioner shall within the three years resist." . . .

He quotes *Bright* v. *Walker* (1), italicising the words, "an enjoyment for twenty years," and says:—

> "The conclusion at which I have arrived from the consideration of this judgment is, that although expressions are used in it which undoubtedly, taken literally, indicate an opinion that an easement defeasible or subject to determination on the happening of a condition, could not be created by enjoyment under the statute, yet the Court, in using those expressions, had in its contemplation an enjoyment for twenty years only, and that the limited application of sect. 8 rendered it unnecessary to consider the question now before us. . . ."

He reconciled *Wright* v. *Williams* (2) with *Bright* v. *Walker* (1) by holding that the opinion conveyed by the observations of Parke, B., in their more general sense, was subsequently modified so as to exclude their application to forty years' enjoyment, and said that—

> "In that sense *Wright* v. *Williams* (2) did not interfere with the decision in *Bright* v. *Walker* (1); it but modified *dicta* unnecessary to the judgment."

He adds an observation on *Wilson* v. *Stanley* (3), which, if correct, rules this case:—

> "I take the effect of that decision to be no more than this, that *Bright* v. *Walker* (1) *has established, now beyond controversy in this Court*, that a user for twenty years will not create an easement binding any estate in the servient tenement, unless it bind the fee. . . . If the evidence of the thirty or twenty years' enjoyment be such as, under the circumstances of the case, could not before the Act have been left to the jury *as evidence of a grant* affecting the fee, it will, since the Act, be insufficient to establish the right. But whatever the circumstances may be under which the enjoyment for sixty or forty years took place, it will (if it were as of right and without interruption), as matter of law, *create* the right, unless in the case of the forty years it come within the qualification in the 8th section. . . . The 6th section enacts that no presumption shall be allowed or made in favour or support of any claim upon proof of the exercise or enjoyment of the matter claimed,

(1) 1 C. M. & R. 211. (2) 1 M. & W. 77. (3) 12. I C. L. R. 345.

Appeal. 1899.

HANNA v. POLLOCK.

Fitz Gibbon, L.J.

for any less period of time than such period mentioned in the Act as applicable to the case and nature of the claim. The operation of this section is in no sense restricted to the cases where, but for the Act, the claim would have been to a prescription at Common Law, *i. e.* from time immemorial. Cases so familiar before the statute in which juries were advised to *presume a grant* from the owner of some estate in the servient tenement less than fee-simple, are *plainly within the enactment. In such a case, since the statute, the presumption of a grant cannot be made* from the mere user for a period less than that specified in the Act, unaccompanied by other circumstances aiding the presumption. . . . The object of the Act was to abolish the unpleasant course of juries presuming grants, which they were convinced had never been executed in fact. The possibility of drawing this presumption *is abolished*, but the rights of the parties are left without the presumption, as if, in every case in which forty years' enjoyment under the statute has existed, the presumption, which before the statute *might* have been drawn, had been, in fact, drawn."

This Court affirmed Dowse, B., and Palles, C. B., in *Beggan* v. *M'Donald* (1). From the headnote it appears to have been understood as a decision that the doctrine of *Bright* v. *Walker* (2) does not apply where the enjoyment on which the right depends has been for a period of forty years, implying that the doctrine does apply to an enjoyment for twenty years. Ball, C. says:—

"In the case of the user for twenty years, it has been decided by the judgment of the English Court of Exchequer in *Bright* v. *Walker* (2), that no user will avail unless adequate to bind the fee; it will not suffice that it was asserted against a lessee under the fee, and further, if it does not bind the fee, it is held not to bind anyone. This judgment has not escaped criticism, of which a summary, distinguished by the learning and acuteness that characterised the late Pigot, C. B., may be found in *Wilson* v. *Stanley* (3). But however the judgment may be criticised, it seems to me that it is now too late to question the authority of the case itself, and that *whenever we are concerned with only a twenty years' user, it must be followed.*"

May, C. J., gives reason and authority for sustaining the doctrine of *Bright* v. *Walker* (2) as applied to twenty years' user. He says:—

"The object of the Legislature" (in the Prescription Act) "seems to have been definitely to fix and ascertain the periods, and the

(1) 2 L. R. Ir. 560. (2) 1 C. M. & R. 211. (3) 12 I. C. L. R. 345.

circumstances, during and under which the user of the incorporeal rights therein dealt with should be deemed to confer a title to such rights The language of Lord Westbury in *Tapling* v. *Jones* (1) in reference to the right to the access of light is, I think, applicable to all the easements with which the Act is conversant. 'It is material,' said the Chancellor, 'to observe that the right to what is called an ancient light now depends upon positive enactment. It is matter *positivi juris*, and does not require, and, therefore, ought not to be rested *upon any assumption of grant*, or fiction of a license having been obtained from the adjoining proprietor. . . .' The statutory enactments confer the right, and the mode in which it is conferred can properly be ascertained only by a reference to the Act itself."

Morris, C. J., concurred with the other members of the Court in the judgment pronounced in favour of the defendant, upon the enjoyment for forty years, and on that alone.

Fahey v. *Dwyer* (2) was decided by the Common Pleas to the same effect in 1879. There were pleas of prescription for twenty and for forty years. The jury found for the defendants on both. Lawson, J., says:—

> "If there was any difficulty about the case, *Beggan* v. *M'Donald* (2) appears to remove it, for it decided that a period of *forty years'* enjoyment is absolute and indefeasible, and that *Bright* v. *Walker* (3) *applies only to a twenty years' enjoyment.*"

It is immaterial to the present purpose to consider whether tenure under a common landlord ought to have made a difference.

Timmons v. *Hewitt* (4) was tried before Holmes, J., in 1887, upon pleas of twenty and of forty years' user. The plaintiff's counsel asked for a direction, on the ground that one tenant from year to year could not prescribe for a right of way over the land of another yearly tenant under a common landlord. The learned Judge "acceded" to this proposition as far as a twenty years' prescription was concerned, but he left the question of forty years' enjoyment to the jury, with a second question whether the landlord, at the creation of the defendant's tenancy, reserved

(1) 11 H. L. C. 304.
(2) 4 L. R. Ir. 271.
(3) 1 C. M. & R. 211.
(4) 22 L. R. Ir. 627.

Appeal. 1899. HANNA v. POLLOCK. Fitz Gibbon, L.J.

the way in question in favour of the plaintiff's holding. He reported that he told the jury,

> "That they must be satisfied before they could find the first question for the plaintiff, that the user had existed *for the full period of forty years*, and that, however clear the evidence might be of user for a shorter period, *no inference ought to be drawn from this without actual evidence*."

As every prescription, by its nature, rests on the presumption of a lost grant before legal memory, this direction must, in the mind of any one who remembers the rudimentary principle of the law, apply to the presumption of a grant, and it must rest on an adoption of the doctrine of *Bright* v. *Walker* (1), as applied to user for less than forty years. In the Exchequer, Palles, C.B., referred to *Fahey* v. *Dwyer* (2), *Beggan* v. *M'Donald* (3), and *Clancy* v. *Byrne* (4), and laid down that user and enjoyment by one tenant against another "is not as of right within the meaning of the Prescription Act, sect. 2 . . ." He says:—

> "It is a user by a termor who, if he acquire the right, must acquire it as incident to the land of which he is termor, and thus for the benefit of his reversioner. Such user cannot be as of right, unless a reversioner can in law by user acquire a right against himself."

He starts the question whether, and he expresses his own opinion that,

> "It is competent for the jury to infer from twenty years' enjoyment, as of right and without interruption of an easement claimed by the owner of one of the tenements over the land of the other tenement, held under a common landlord, *either* a grant by deed from one tenant to the other tenant of such easement, *or* where the user is proved" (as it was there) "to have existed as far back as the memory of the witnesses can go a jury may infer that the alleged dominant tenement was such dominant tenement, when originally demised by the landlord, that is, that it consisted not of the land merely but of the land with a right of way as appurtenant."

Upon the first of these propositions, he says that—

> "The decision of the Exchequer Chamber in *Deeble* v. *Linehan* (5) appears to be a conclusive authority."

(1) 1 C. M. & R. 211.
(2) 4 L. R. Ir. 271.
(3) 2 L. R. Ir. 560.
(4) I. R. 11 C. L. 355.
(5) 12 I. C. L. R. 1.

With all respect for his almost unvarying accuracy, I feel that the omission to observe that *Deeble* v. *Linehan* (1) was decided upon the law as it stood before the Prescription Act was extended to Ireland, deprives the opinion which he formed upon that question of any possibility of support from the only authority upon which he founded it. *Deeble* v. *Linehan* (1) can have had no application either to the doctrine of *Bright* v. *Walker* (2), or to the effect of the Prescription Act, which are the only matters with which we have now to deal.

In this Court these questions were argued in *Timmons* v. *Hewitt* (3); but the Court expressly declined to express any opinion upon them, holding that there was, upon the report of the learned Judge, sufficient evidence to sustain both the findings of the jury, and therefore that the verdict should stand as well under *Beggan* v. *M'Donald* (4) on the ground of forty years user, which bound the fee, as also upon the principle of *Clancy* v. *Byrne* (5), that the way in question was appurtenant to the plaintiff's holding at the time of its creation.

Therefore *Timmons* v. *Hewitt* (3) applies to the point now before us only in the direction which Holmes, J., gave the jury, that no right could be acquired by user for twenty years, and in the opinion of the Chief Baron, founded on *Deeble* v. *Linehan* (1) in the belief that it applied to the Prescription Act.

O'Kane v. *O'Kane* (6) was tried by Palles, C. B., who repeated his opinion that twenty years user was sufficient to authorize the jury to presume a grant from one tenant to another. The jury found twenty years user, and negatived forty years user, and therefore apparently the Queen's Bench was brought face to face with the question which we are now discussing; but because the defendant's counsel had not objected to the question which the Chief Baron had left to the jury, the course of the trial was made the sole ground of the decision. O'Brien, C. J., said:—

> "The course of the trial precludes the defendant from all right to insist on the objection. It is plain that the trial proceeded on the basis

(1) 12 I. C. L. R. 1.
(2) 1 C. M. & R. 211.
(3) 22 L. R. Ir. 627.
(4) 2 L. R. Ir. 560.
(5) I. R. 11 C. L. 355.
(6) 30 L. R. Ir. 489.

Appeal. 1899.

HANNA v. POLLOCK.

Fitz Gibbon, L. J.

that the right claimed could have been created by grant. . . . Had counsel desired that the question of lost grant should be put expressly to the jury he should have said so at the trial; and if he meant to contend that such a right could not have been, under the circumstances of the particular case, created by grant, he should have made the objection. . . . We decide this case upon the course of the trial; we do not formally decide whether one tenant can or cannot confer upon another such a right of way by grant."

No doubt he goes on to say that he does not see why a tenant from year to year should not be able to grant such a right so long as his tenancy lasted; but, as the foundation for this opinion, he adopts the view of Pigot, C.B., in *Deeble* v. *Linehan* (1), and he says that the course indicated by that learned Judge should as a general rule be adopted. He also omits to notice the anachronism in relying upon that case as an authority upon the Prescription Act or upon *Bright* v. *Walker* (2).

This is the last Irish case upon the subject.

Before expressing my own conclusion, I must point out the extraordinary position in which the supposed right has been left in the present case as the result of the trial. The Chief Baron reports that the title of neither plaintiff nor defendant was proved by legal evidence. The plaintiff put in an assignment of January 25th, 1867, from M'Curdy Hamilton to Ann Hanna of lands demised by two leases, one dated April 10th, 1807, for eighty-seven years, which expired before action on November 1st, 1893; the second lease, dated November 4th, 1836, was of other lands, and was for thirty-one years and certain lives. The leases themselves were not put in evidence; it did not appear what part of plaintiff's lands had been held under the last lease, nor who were the lives in the lease of 1836, nor whether they were alive or dead. The plaintiff also gave in evidence a vesting order of the Land Commission dated April 25th, 1894, whereby the fee-simple of the lands, subject to the two leases, was vested in the plaintiff.

Though he directed a verdict and gave judgment for the defendants on the findings of the jury, the Chief Baron reports that he abstained from giving judgment in reference to the injunc-

(1) 12 I. C. L. R. 1. (2) 1 C. M. & R. 211.

tion which the defendants sought by their counterclaim, *i.e.* he refused to quiet the defendants in the possession of the right, because it appeared to him that the evidence was "in the last degree unsatisfactory" on what, in his view, was an essential part of the case, viz., the continuance of the lives in the leases under which the plaintiffs and defendants respectively held before they acquired the fee from the Land Commission.

In the view which he took and continued to take of the case, the right acquired under the lost grant found by the jury was limited to the continuance both of the defendant's lease, which does not appear to have been given in evidence at all, and of the lease of the 4th November, 1836. No evidence was given of any of the lives being in existence at the date of the writ, nor were even their names disclosed. The report concludes:—

> "The verdict for the defendants rested upon the direction which I gave the jury that the lives must be presumed to be in existence until the contrary was proved."

No more striking instance could well be given of the inexpediency of weakening the effect of the doctrine in *Bright* v. *Walker* (1), which gives to the Prescription Act the effect of substituting definite absolute and statutory rights, for limited conditional or temporary rights founded on the fiction of grants. As the result of the trial, the defendants cannot enforce the rights to which the jury have found them entitled, unless they can prove the continuance of the lease of 1836, and then only until the last life drops, unless, contrary to the opinion and direction of the Judge at the trial, a question upon the effect of the Land Purchase Acts is decided in their favour. I believe that we are all agreed that this question is not to be discussed until it arises, and it cannot arise until the lease of 1836 is proved to have expired.

My own conclusion upon the whole matter may be shortly stated; repeating that I state it only in deference to my colleagues, who think it their duty to discuss it, and that I hold myself and the Court free to reconsider it if it becomes essential to a judgment in any future case.

(1) 1 C. M. & R. 211.

Appeal. 1899. HANNA v. POLLOCK. Fitz Gibbon, L.J.

The doctrine of *Bright* v. *Walker* (1), when restricted to the enactment as to twenty years' user, appears to me to be reasonable and logical. Prescription before the Act necessarily involved the presumption of a grant before legal memory. Therefore an enactment to "shorten the times of prescription in certain cases" dealt expressly with cases of enjoyment only; but it impliedly dealt with every case where the right rested on mere enjoyment. Wherever this was supplemented before the Act, the case was outside the Act, and the presumption may still be made independently of the Act, and for that purpose the plea of "lost grant" remains still legitimately in use. By the words of section 2, twenty years' enjoyment only removed the liability to defeat by proof that the enjoyment of what was claimed as of right had commenced within legal memory, and left the claim in all other respects as defeasible as before. Forty years user on the other hand, under the combined operation of sections 2 and 8, conferred the right, subject only to defeasance by a particular person, namely, the reversioner, within the prescribed time, namely, within three years after the reversion fell into possession. Section 6 prohibits any presumption, including the presumption of a lost grant, from enjoyment for any period shorter than those fixed by the Act. Therefore, in every case in which the evidence of the right consists *only*, as it does here, of *mere user*, the presumption cannot be made unless the user covers the statutory period required to confer the right, namely, forty years, and the claim remains liable, as it was before the Act, to defeat by proof that the fee is not bound, if the user is shorter than forty years.

This is quite consistent with retaining the right to make the presumption of the lost grant from evidence, or from circumstances other than the mere user with which alone the Act is conversant.

The Irish decisions since the Act appear to me to have repeatedly recognised the application of the doctrine in *Bright* v. *Walker* (1) to twenty years' enjoyment, and no English decision appears to me to be inconsistent with it. It is still recognised as an authority in every text-book.

(1) 1 C. M. & R. 211.

In Ireland the only reported *opinions* to the contrary rest upon *Deeble* v. *Linehan* (1), without observing that that case did not apply to the Prescription Act. A *decision* to the contrary would appear to me to be inconsistent with the view of the object of the Act which I have quoted from Pigot, C.B., Palles, C.B., Ball, C., and May, C.J. It would be equally inconsistent with all the recognitions of the authority of *Bright* v. *Walker* (2), as restricted to twenty years enjoyment, which I have quoted from the Irish cases.

I am not prepared now to assume that, in every one of those cases, the result would have been the opposite of what it was, if the plea of twenty years user had been supplemented by a plea of a lost grant. I cannot assume that the right was defeated in all those cases by the mere omission of a plea. There are expressions in English cases, to which my colleagues will refer, which indicate the opinion of some individual judges that the Prescription Act left it open to the jury to find a lost grant in every case in which it might have been presumed before the statute; but if these opinions are right, or if they extend to the case of mere user by one termor against another for less than forty years, *Bright* v. *Walker* (2) must be wrong, and the object of the Act, as hitherto stated, must be defeated.

I have quoted Lord Westbury (3), and I might quote Lindley, L.J., and other judges to the contrary effect; but finding the state of Irish authority to be what it is, I hold myself bound to uphold *Bright* v. *Walker* (2) as applicable to the case before us, and to leave it to the House of Lords to throw it open again to juries, in every case of mere enjoyment, to make the false presumption of a grant against the fact, a power which the Prescription Act was, in my opinion, intended, in the words of Palles, C.B., to "*abolish*" in the cases to which the Act applied.

If I am told that the practice on circuit upon Civil Bill Appeals makes this an important question, I answer, first, that that practice, if it exists, cannot guide this Court; but I also say that the practice of ignoring *Bright* v. *Walker* (2) is not proved. In my experience, in every case in which it is possible

(1) 12 I.C.L.R. 1. (2) 1 C.M. & R. 211.
(3) *Tapling* v. *Jones*, 11 H.L.C. 304.

Appeal. 1899.

HANNA v. POLLOCK.

Fitz Gibbon, L.J.

to do so, evidence of acquiescence is given, in order to bind the superior estate through the acts, or even through the inaction, of landlords, of agents, or of bailiffs; or to carry back the evidence to a period of forty years, or to give circumstantial evidence of a grant in fact. In every case in which evidence of mere user has been thus supplemented, the additional evidence would have been unnecessary, if user alone would have sufficed. In most cases, proof of user for twenty years raises some presumptive evidence of user for forty, unless the commencement of the user between the two limits is proved. Speaking from an experience of eighteen years at the Bar, and of twenty years on the Bench, I can distinctly say that *Bright* v. *Walker* (1) has always been a stumbling-block in the way of relying on mere user for twenty years as sufficient to create a right against a term, and I cannot call to mind a single instance in which mere user for twenty years (forty years' user being disproved) has been made the basis for presuming a grant by a tenant, which would not bind the fee. If we discount the cases in which forty years enjoyment, or acquiescence of the owner in fee, or circumstantial evidence of a grant in fact, was called in aid, I believe that it will be found that the cases in which *Bright* v. *Walker* (1) has been disregarded, if any such exist, are very limited indeed in number, and are at least as questionable in law and justice as the present case appears to me to be.

I am obliged to close my lengthened contribution to this discussion, by repeating that it is at best, in my opinion, only an excoitation, because the defendants have failed upon the question of fact.

WALKER, L. J. :—

This case involves two questions, one depending on the inference to be drawn from the facts, and only of interest to the parties concerned, and the other of great general importance in Ireland, viz., whether there can arise from user as of right for twenty years, a presumption of a grant of a right of water from one termor to another termor?

As to the first question, the defendant claims a right to have a flow of water through an artificial cut, or channel, formed in

(1) 1 C. M. & R. 211.

1861, continued by the maintenance of a carry from the point "Weir" on the map to N, along the mearing fence, and thence to the defendant's tank; and it must be taken that this flow has continued since 1861 to the removal of the carry before action by the plaintiff for the purpose of drainage works.

The fact that the watercourse is entirely artificial does not determine the question, because it is well settled that a right may be acquired as such, under some legal origin, whether grant or arrangement. As is said by Wood, V.-C., in *N. E. Railway Company* v. *Elliot* (1) :—

> "The true distinction does not depend, as was said in *Magor* v. *Chadwick* (2), upon whether the channel is artificial or natural, but upon the purpose and origin of the work, and the circumstances of the enjoyment consequent upon it."

The facts are hardly in dispute. The plaintiff's farm is flooded by springs called the Checker Hall Springs, and before 1861, his predecessor in title had attempted to drain the farm by a pipe running from the point C to the Killaggan river, considerably above the present cut.

In 1861, the plaintiff's predecessor altered his mode of drainage, and constructed the present cut through his own lands down to the point marked "Weir," and thence along the mearing drain to S, at the Killaggan river.

The jury have found that before the drainage operations of 1861, no water flowed as of right from the point "Weir" to N, and there could scarcely have been any other finding, for N is at a higher level than "Weir," and the mearing ditch was choked up to 1861.

There had always been, I think, some water flowing from Whitegate above to N, and through a hole there along the road to the defendant's tank, but not from the "Weir," and when the plaintiff's predecessor made the cut, and the mearing fences were cleared from "Weir" to N, and "Weir" to S, probably as a joint work, a carry was erected which turned some of the water coming down the cut to N. The plaintiff swears that the drain from

(1) 1 J. & H. 145. (2) 11 Ad. & E. 571.

Appeal. 1899.

HANNA v. POLLOCK.

Walker, L.J.

"Weir" to S is his own drain, which is all the evidence we have on that subject. What I think we have to ascertain is, what was the origin and purpose of the work constructed in 1861? I think upon the whole, it was—like the pipe for which it was substituted—a mere drainage operation for the plaintiff's own purposes, and on his own lands, which from the nature of the thing he could alter, or improve, or put in another place, and any grant of water which the defendant got must be of the same character as the work out of which it issued, and therefore, *ex natura rei*, temporary, and if temporary, the use must have been permissive, and could not form the foundation for a lost grant. It seems difficult to contend that the plaintiff should always be compelled to drain his farm in that place, and by a drain of the same depth, incapable of improvement or alteration. I think the origin and purpose of the cut rebut the idea of permanency, or creation of right. This is the view taken by Mr. Justice Andrews, with whose judgment, after consideration, I concur.

If I could think that any benefit could result from a new trial, I should be disposed to say that the case ought to be tried again, as the objection with which I am dealing was not made at the trial; but the facts are really not in dispute, and must always bring up the question as to what was the origin and purpose of the work done in 1861.

The view I have taken would be sufficient to dispose of the case in favour of the respondents, and under ordinary circumstances it would be unnecessary to express any opinion upon the question, as to whether there can be any presumption of a lost grant arising from a twenty years' enjoyment, as distinguished from a forty years' enjoyment, of an easement such as claimed in this case, where the grant must be presumed to have been made by one tenant to another, either where the tenants hold under different landlords, or, as here, under the same landlord.

In this country, where long leases are so common, and even tenancies from year to year have become almost perpetuities, the importance of a decision adverse to the possible existence of such a right cannot be exaggerated.

I think it right to say, that having given the fullest consideration to the question, I am not prepared to concur with the

view of Lord Justice FitzGibbon. In my opinion, the decision in *Timmons* v. *Hewitt* (1) was right.

It is interesting to trace in this country the course of decision, which is a progressive one, ultimately terminating in the decision in the Courts of first instance of the very question which we have to decide.

In *Beggan* v. *M'Donald* (2) it was held by the Court of Appeal that a period of forty years' uninterrupted enjoyment of a way by one tenant against another created, under the Prescription Act, sections 2 and 8 together, a right absolute and indefeasible, though liable to be defeated by the reversioner within three years after the determination of the term, which in that case had not expired. The questions there arose between tenants holding under different landlords. It must be distinctly observed that it was not considered necessary that the fee should be absolutely bound. In fact the point of the case is that it was only so conditionally. In *Beggan* v. *M'Donald* (2), Fitzgerald, B., and Deasy, B., in the Court of Exchequer, held that no title was given to the easement by the forty years' enjoyment, having regard to the 8th section of the Act, and *Bright* v. *Walker* (3) was treated as an authority for that. Both Dowse, B., and the Chief Baron expressed the opinion that *Bright* v. *Walker* (3) decided that the plea of twenty years' user could not be sustained under the Prescription Act, inasmuch as the servient tenement was under lease. No question of lost grant between the termors arose, or was discussed in that case. The case was dealt with solely on the Prescription Act.

In *Fahey* v. *Dwyer* (4) the same question arose on a forty years' user between two tenants claiming under the same landlord, and the Court of Common Pleas decided that the defendant was entitled to succeed. In both these cases the action was one of trespass, and the defendant justified under a plea of a prescriptive right of way, and in *Fahey* v. *Dwyer* (4) the case of *Gayford* v. *Moffatt* (5) was relied on for the plaintiff.

(1) 22 L. R. Ir. 627, 641.
(2) 2 L. R. Ir. 560.
(3) 1 C. M. & R. 211.
(4) 4 L. R. Ir. 271.
(5) L. R. 4 Ch. 133.

Appeal. 1899 HANNA v. POLLOCK. Walker, L.J.

The question next arose in *Timmons* v. *Hewitt* (1), tried before Lord Justice Holmes. That case also was one between tenants from year to year, holding under the same landlord, and the action was for obstructing a right of way. The learned Judge left to the jury two questions.—1, Did the plaintiff and his predecessors in title enjoy, as of right, and without interruption, the way on foot, and with horses and carts, for forty years before action? and 2, Did the landlord at the creation of the defendant's tenancy reserve the way in favour of the plaintiff's? The jury found both issues for the plaintiff, and a verdict and judgment were entered for him accordingly. The case was argued before the Court of Exchequer. The Chief Baron who delivered the judgment upholding the plaintiff's verdict declined to rest it upon the doctrine of prescription, but supported it on the ground that from the enjoyment it was competent for the jury to presume a grant of the easement from the one tenant to the other. The Chief Baron says (p. 647):—"It is competent for the jury to infer from twenty years' enjoyment as of right and without interruption of an easement claimed by the owner of one of the tenements over the land of the other tenement, a grant by deed from one tenant to the other tenant of such easement." The defendant appealed, and the Court dismissed the appeal, holding that there was evidence to sustain both findings of the jury, *i.e.* the finding of forty years' user, and also the reservation by the landlord of the way at the creation of the defendant's tenancy.

The case, therefore, is no authority as an appeal decision beyond this, that the Judges must have considered that the fact that the tenants held under the same landlord did not prevent the existence of the right. In *O'Kane* v. *O'Kane* (2) the question also arose between two tenants from year to year, holding under the same landlord; the case was tried before the Chief Baron, and he left to the jury the question whether the plaintiff for the twenty years next before the suit enjoyed as of right and without interruption the way claimed, and the jury so found. On the Chief Baron's report the Court of Queen's Bench came to the conclusion that the question had been left with the view of raising the

(1) 22 L. R. Ir. 627. (2) 30 L. R. Ir. 489.

presumption of a lost grant, and that no sufficient objection had been made by defendant's counsel, and that the course of the trial precluded him from contending that the right could not have been created by grant.

The Chief Justice, however, says:—"We do not see why a tenant from year to year should not be able to grant such a right as long as the tenancy lasted. He could, in my opinion, confer by express grant such a right as long as his tenancy subsisted, and as to the doctrine of lost grant, I consider it a very useful one, and I think this case is an example of the salutary effect of this fiction of a lost grant."

I think it cannot be disputed that those views of the Judges of first instance are in some respects at variance with the decision in *Bright* v. *Walker* (1). I read that case as deciding that at all events since the Prescription Act the qualified right from termor to termor cannot arise out of a presumption of lost grant founded on an enjoyment for twenty years, and the observations in *Wheaton* v. *Maple* (2) are to the same effect, and are also as it appears to me inconsistent with *Beggan* v. *M'Donald* (3). Being, therefore, forced to choose between the decisions in this country, and that in *Bright* v. *Walker* (1), I shall proceed to state the reasons which induce me to prefer to follow the Irish decisions.

It will be material to see—1, what the law was as to the presumption of a lost grant when the Prescription Act was passed, and 2, whether that Act altered the law applicable to this doctrine.

Prescription at common law involved that the user began before the time of legal memory; and, it followed from that, none could prescribe except those whose interests were sufficiently permanent—a tenancy in fee was the only continuing estate, which could have an origin coeval with legal memory, and therefore neither tenant for life or for years could prescribe, and a prescription in a *que* estate should always be laid in the person who was seized of the fee-simple. The instability of other estates necessarily imported that they began within the memory of man. Hence prescription at common law was always defeated by proof of the commencement or origin of it. Still even in prescription

(1) 1 C. M. & R. 221. (2) [1893] 3 Ch. 48. (3) 2 L. R. Ir. 560.

Appeal. 1899. HANNA v. POLLOCK. Walker, L.J.

at common law it was allowed only to supply the loss of a grant, and upon immemorial usage the law presumed an ancient grant and lawful beginning.

But in order to create a legal title which would be in harmony with long enjoyment it was in very early times established that proof of long enjoyment, though beginning within legal memory, would support a title under a fiction of lost grant, presumed from enjoyment, provided it were not by force, or secret, or by permission, and this period of enjoyment was ultimately adapted in time to the analogous period fixed by the statute 21 Jac. 1, as to lands, viz. twenty years. The principle was to quiet a possession had against another, and attribute to it for that purpose a lawful origin, the analogy of which would apply to a grant from termor to termor. No doubt the precedents of pleas of lost grant are all from owner in fee to owner in fee, which may be accounted for by their origin being at a time when the practice as to instructing a jury to presume a grant from twenty years' enjoyment, though the origin was fixed, had not become settled on this subject. However, the observations of Parke, B., in *Bright* v. *Walker* (1) leave the matter free from doubt. He says at p. 221:—"Before the statute this possession," *i.e.* for twenty years, "would indeed have been evidence to support a plea or claim by a non-existing grant from the termor in the *locus in quo* to the termor under whom the plaintiff claims, though such a claim was by no means of ordinary occurrence, and in practice the usual course was to state a grant by an owner in fee to an owner in fee, but" (he adds) "since the statute such a qualified right we think is not given by an enjoyment for twenty years."

The case of *Deeble* v. *Linehan* (2) in this country decided before the Prescription Act in the Court of Error, and therefore binding on us, is an express authority to the same effect. There there had been an enjoyment of a watercourse from 1826, against occupiers of land, of which one Lyne was the reversioner. Lyne was himself sub-lessee in the second degree under the see of Cork, to which the fee belonged, and Lyne having evicted the lands and got into possession and obstructed the watercourse, it was held that

(1) 1 C. M. & R. 211. (2) 12 I. C. L. R. 1.

there was evidence to go to the jury of a presumption, as distinguished from the actual execution of a grant, of the right, with the acquiescence of Lyne the reversioner; as he was the person who obstructed the watercourse it was necessary to establish the right against him. So in the case of *Wilson* v. *Stanley* (1), Pigot, C.B. in describing the objections to the reasoning in *Bright* v. *Walker* (2), says—"It would apparently be consistent with the purpose disclosed in the preamble" (*i.e.* of the Act) "that where prescription was not applicable (as where all the estates in the land were not bound) a presumption of a legal origin of the enjoyment in a grant from some competent party might still be made against the party against whom, before the Act, such presumption would have had the sanction of constant practice and established user." It would seem to me, therefore, that before the Prescription Act a presumption of a lost grant might have been made between two termors.

In *Bright* v. *Walker* (2), every defence, including the defence of a way under a lost grant was open under the plea of not guilty, and there is no doubt that the Court decided that since the Act such a grant could not be available against anyone, unless it bound the fee—in other words, that the doctrine of lost grant was materially interfered with by the statute. Parke B., says—"We have had considerable difficulty in coming to a conclusion on the point, but upon the fullest consideration we think that no title at all is gained by an user which does not give a valid title against all and permanently affect the see"—in that case the fee.

Lord St. Leonards, in his work on Real Property Statutes, referring to the question decided, says—"It must be admitted that it is a question of great nicety." It may well be, and I assume, that as regards prescriptive titles the shortening of the title under that head left applicable to the new period all the doctrines which applied to prescription at common law, so that such prescriptive title would still be defeated by showing that the alleged servient tenement was held under a lease for years, but I cannot see any reason for attributing to it an intention to interfere with the doctrine of presumption of a lost grant, so far as that existed before the Act. On the contrary there are opinions of several Judges

(1) 12 I. C. L. R. at p. 357. (2) 1 C. M. & R. 211.

Appeal. 1899. HANNA v. POLLOCK. Walker, L.J.

distinctly opposed to any such idea. In *Angus* v. *Dalton* (1), Cockburn, C.J., says—"Does the statute apply to the presumption of a lost grant at all?" He observes that the Act professes to deal with the matter of prescription alone, and in proof of that refers to the preamble. He says further on—"As regards the presumption of a lost deed as rights arising from supposed grant, although the statute may have introduced easements created by grant for the purpose of making such rights indefeasible by prescription at the end of forty years, it is difficult to see how the presumption arising from an enjoyment for twenty years can be in any way affected by the Act"; and he concludes, "The only conclusion therefore at which I can arrive is that, as regards the effect of twenty years' user or enjoyment in the matter of easements by presumed grant, the law stands exactly as it did before the passing of the Act."

The same view appears in the judgment of Mellish, L.J., in *Aynsley* v. *Glover* (2). He says "The statute 2 & 3 Wm. 4, c. 71, has not, as I apprehend, taken away any of the modes of claiming easements which existed before the statute. Indeed, as the statute requires the twenty years or forty years (as the case may be), the enjoyment during which confers a right, to be the twenty years or forty years next immediately before some suit or action is brought with respect to the easement, there would be a variety of valuable easements which would be altogether destroyed if a plaintiff was not entitled to resort to the proof which he could have resorted to before the Act passed." In practice a plea of a right under a non-existing grant is still usual, and will be applicable, as already pointed out, where a plea of user under the statute would be defeated, *e. g.* if the evidence of user does not go down to the action, or where there has been an interruption of enjoyment within the prescribed statutory period: see *Lowe* v. *Carpenter* (3), where the defendant was given liberty to amend by putting on the record a plea of non-existing grant.

In *Bright* v. *Walker* (4) the jury found that they would not presume any grant of a right of way by the bishop, the owner in fee, and the Court held, first, that enjoyment gave no right against

(1) 3 Q. B. D. at pp. 118, 119.
(2) I. R. 10 Ch. 255,
(3) 6 Ex. 825.
(4) 1 C. M. & R. 211.

the bishop, bringing in aid in support of that view section 8—a view which, so far as resting on section 8 has been criticised, and even dissented from.

Now, as before the Prescription Act, possession for over twenty years would have been evidence to support a claim or plea of lost grant from termor to termor, nothing was wanted in the way of legislation to extend this if facilities were intended to be given for supporting title founded on enjoyment. But prescription stood on a different footing. It should have been from time immemorial, and titles by immemorial prescription were such as absolutely bound the fee. On principle it would seem that the shortening by the statute of the term of prescription would still leave its character the same, and, therefore it should be a user against the fee if you rest your claim on prescription.

But it seems strange that the making the prescriptive title easier by shortening the duration of the necessary user to twenty years should be held to take away the qualified right which existed before it, the presumed grant from termor to termor which I assume to have existed before. Parke, B., says, "The statute nowhere contains any intimation that there may be different classes of rights—qualified and absolute—valid as to some and invalid as to others" (1). True, but it contains no contrary intimation, and I can conceive no reason for saying that a statute which was intended to facilitate title by enjoyment should be held to take away a class of title by enjoyment which existed before it and which from its qualified character does not interfere with, and is not inconsistent with, title by prescription in its old character from user from time immemorial against the fee, or its statutory character of twenty years against the fee.

It is admitted in the judgment that nothing in the statute prevents the operation of an actual grant from lessee to lessee though lost, if the proof of the loss be given, and secondary evidence of its contents adduced.

In the case of a presumed lost grant the jury always found its existence by presumption, being directed that they might so find, and I think I may add, even though they did not believe it was ever

(1) *Bright* v. *Walker*, 1 C. M. & R. 211.

Appeal. 1899.

HANNA v. POLLOCK.

Walker, L.J.

made, and it is difficult to see why presumed grant and actual grant should stand on a different footing for the confirming of the right. I assume that no circumstance is attached to the enjoyment which would have defeated the presumption before the statute, such as that it was secret or permissive, &c. Section 2 of the Prescription Act creates an additional mode of claiming easements, but that has not abolished the former modes, and if the mode of claiming an easement under a presumed though really non-existing grant survives the statute at all, why should it not survive with all its incidents, one of which was that a termor might be presumed to have granted to another, when he might have done so before?

To say that the statute has not created a new class of easements is one thing, but to say it has destroyed a previously existing kind is another. It is true that there are *dicta* that an easement for a limited time, or available only against a particular owner or occupier of the alleged servient tenement, could not have been created before the statute, or since it, save by a grant to be proved as a fact and not inferred by legal presumption.

But the case of *Deeble* v. *Linehan* (1) is an express authority binding on us that before the statute a right to the enjoyment of a watercourse may be established under the doctrine of presumed lost grant against a tenant, when the fee is not bound. It cannot be disputed that there are observations made by the present Master of the Rolls in England in the case of *Wheaton* v. *Maple* (2) which are inconsistent with the views I have stated. The plaintiff claimed an easement of light. The defendants were lessees of the Crown under a lease expiring in 1914, which they surrendered on the 5th September, 1892, and the Crown agreed to grant them a new lease, and the defendants agreed to erect a new building which they proceeded to do. The plaintiff's house had been built in 1852, and he had enjoyed his lights against the Crown lessees for more than forty years before the action, which was brought in March, 1893, within three years after the surrender. The Court dealt with the case independently of the Prescription Act, and, secondly, under it. It was argued that a grant should be presumed from the lessee of the Crown, and

(1) 12 I. C. L. R. 1. (2) [1893] 3 Ch. 48.

the Master of the Rolls says that he is not aware of any authority for presumiug as a matter of law a lost grant by a lessee for years in the case of ordinary easements, and he states that he was not prepared to introduce another fiction to support a claim to a novel prescriptive right, and further on he refers with approval to *Bright* v. *Walker* (1), as establishing that the Act had not created an easement for a limited time only, or available only against particular owners or occupiers of the servient tenement, and the observations of A. L. Smith, L.J., are to the same effect.

Apparently, the Master of the Rolls would, if *Beggan* v. *M'Donald* (2) were before him, have taken the same view as in that case Fitzgerald, B. did in the Court of Exchequer; but it seems to me obvious that these observations are inconsistent with two decisions which I consider bindiag on me, viz. *Deeble* v. *Linehan* (3), and, in its result, *Beggan* v. *M'Donald* (2).

I have already stated the reasons which induce me to think that it makes no difference in the case that the right is claimed between two tenants holding under the same landlord. Such a right could not be established under the doctrine of prescription proper, as this would lead to a reversioner getting a right against himself; but if the qualified right can exist when it is claimed by one tenant against another, in the case of tenants holding under different landlords, the doctrine of *Gayford* v. *Moffatt* (4) is not invaded by the qualified right being established in favour of one tenant against his co-tenant, both holding under the same landlord. It can exist admittedly in the case of an express grant in such a case.

We have to decide whether we will over-rule the view of the Court of Exchequer in *Timmons* v. *Hewitt* (5). If we are bound in point of law to do so we must follow *Bright* v. *Walker* (1) in this respect; but such a result would be in this country extremely inconvenient, and I am glad to be able to come to a conclusion in accordance with the decision of the Court of Exchequer in *Timmons* v. *Hewitt* (5) and the result of *O'Kane* v. *O'Kane* (6)

(1) 1 C. M. & R. 211.
(2) 2 L. R. Ir. 560.
(3) 12 I. C. L. R. 1.
(4) L. R. 4 Ch. 133.
(5) 22 L. R. Ir. 627.
(6) 30 L. R. Ir. 489.

Appeal. 1899.

HANNA v. POLLOCK.

in the Court of Queen's Bench that a lost grant of a right to water or a right of way may still be presumed from enjoyment of twenty years between two tenants, whether holding under the same landlord or not.

HOLMES, L.J. :—

We are confronted at the threshold of this case with the question whether it is legally possible to presume a lost grant of an easement by a lessee, where the only evidence is user as of right during twenty years of his term, and where it is practically certain that no such grant was actually made.

If this question had been raised before the Judge of Assize or the Queen's Bench Division, those Courts would doubtless have held that they were bound to follow the decision in *Timmons* v. *Hewitt* (1); and during the discussion before us, I was under the impression that we were also in the fortunate position of having the point ruled for us by a coercive authority. I did not notice until after the argument had closed that the case of *Deeble* v. *Linehan* (2), although it was heard in both the Common Pleas and the Exchequer Chamber after the Prescription Act had been applied to Ireland, had been tried some months before that event, and consequently was determined under the old law. I am not aware that the question has been since decided either in this Court, or in any Irish Court of co-ordinate jurisdiction. It was probably argued on the appeal in *Timmons* v. *Hewitt* (1), but there is no full report of the judgment, and I understand it was decided on other grounds. This therefore is, as far as I know, the first occasion on which an appellate tribunal in this country is called on to form an opinion on a question the importance of which in relation to the enjoyment of landed property in Ireland it would be impossible to exaggerate.

There is I think, no room for doubt as to the state of the law before the Prescription Act. To establish a prescriptive right to an easement, it was necessary to show user extending over the full period of legal memory. Such user was inferred where it had continued as long as living memory went back; but once the beginning of the user was shown, prescription as the foundation

(1) 22 L. R. Ir. 627. (2) 12 I. C. L. R. 1.

of the alleged right failed. It was to meet the manifest inconvenience of this doctrine that the legal fiction of a lost grant was invented. The Courts laid down that the same kind of user, which, if it had existed during legal memory, would have established a right by prescription would, if it had continued for twenty years, afford grounds for presuming that it originated in a grant subsequently lost. It was never necessary to have evidence of a grant in fact. In most cases, it was recognized that the grant was purely imaginary. Formerly Judges were in the habit of advising juries that they were at liberty to presume it without actually directing them to do so; but in later times it has been laid down that it is the duty of juries to make the presumption, if they are satisfied that there has been what is called "user as of right" for twenty years.

It was part of the common law doctrine of prescription that the fee must be bound. This indeed was almost a necessary consequence from the immemorial user, which was its foundation. User going beyond legal memory would have begun previous to all existing interests; and if it bound the lands at all, it must bind every estate therein.

The same consequence does not logically follow from the doctrine of lost grant. If an owner in fee can from evidence of user be presumed to have made an imaginary deed binding the inheritance, which, if it were a real instrument, could not have existed thirty years ago, there seems to be no good reason for not presuming under similar circumstances that a lessee had made an imaginary deed binding his leasehold interest. Accordingly we find it, as I believe, settled law that before the Prescription Act a non-existing grant by a termor might be presumed. *Deeble* v. *Linehan* (1), a case in the Irish Exchequer Chamber, which, in my opinion, this Court is bound to follow, depends entirely upon this proposition; and the point actually decided therein was that the Judge who tried the case was wrong in telling the jury that they must find in order to give a verdict for the defendant that a deed had been actually executed by the termor as a matter of fact. In *Bright* v. *Walker* (2), Baron Parke

(1) 12 I. C. L. R. 1. (2) 1 C. M. & R. 211.

Appeal. 1899. HANNA v. POLLOCK. Holmes, L.J.

said that, "Before the statute this possession" *i.e.* possession of a right of way for twenty years during a lease, "would have been evidence to support a plea or claim by a non-existing grant from the termor in the *locus in quo* to the termor under whom the plaintiff claims."

As far as I am able to form an opinion this was accepted law in England as well as in Ireland. At all events, since *Deeble* v. *Linehan* (1) no Irish Court can reject it, and we have only to consider whether it has been affected by the Prescription Act.

In answering this question, it is necessary to refer to the language of the Legislature and to subsequent judicial authority; but before doing so, I desire to point out again that the two methods of establishing a right to an easement to which I have referred, differ in their origin, character, and incidents. The first, to which the name of prescription was especially attached seems to have been coeval with our Common Law. Although the right that springs from it presupposes a grant, or something equivalent to a grant, the element of grant does not enter into its legal conception or definition. Its foundation is enjoyment from the time of King Richard the First, and when once established it is absolute and indefeasible. The second has been often referred to, and denounced as a modern instance of judge-made law; and it seems to have been first heard of during the eighteenth century. Its admitted object was to supply a legal basis for rights other than the common law doctrine of prescription; and those rights might have been conditional on the continuance, or limited to the duration, of particular estates in the lands over which they were to be exercised.

There was one feature common to both methods. Each depended on a fiction. It has been said by some Judges that it is scandalous to require a jury to find the loss of a deed that has never existed. To my mind, it is not more scandalous than to ask a jury to affirm a claim or defence founded on prescription at common law. In the majority of cases it is impossible that an easement could have been enjoyed for the full period of legal

(1) 12 I. C. L. R. 1.

memory. Legal anomalies of this kind might, perhaps, be corrected, but there is no scandal involved in them. A fiction, recognised by and incorporated with the law, ceases to be a fiction. It then becomes the formal mode of expressing a reality; and it is this reality—such as user, as long as living memory goes back, or user for twenty years before action—that is affirmed by the jury. Still, in 1832 there was ample room for improvement in this branch of our jurisprudence. If the legislative reformer of that year had succeeded in defining, with precision, the extent and nature both of the user capable of conferring a right, and of the right capable of being thus conferred, he would have been a public benefactor. Perhaps his aim was less ambitious; but whatever was his object, the result has been of little practical value. It is, however, no part of my duty to criticise the Prescription Act as a whole. I am concerned with only one of the perplexities that followed it, namely whether it altered or modified the doctrine of lost grant, and I have only referred to its general character for the purpose of showing that it does not purport to be a code, and only deals with a comparatively small portion of the law of easements.

The title of the Act describes its object as "shortening the time of prescription in certain cases." Assuming that the word "prescription" is used here generally and in its widest sense, the cases referred to do not include those of lost grant, for the period of user for twenty years, upon which this presumption was founded is the shortest period mentioned in the statute. The preamble refers exclusively to the inconvenience arising from the legal meaning attached to the expression, "time immemorial," whereby title to what has been long enjoyed is sometimes defeated by showing the commencement of such enjoyment. The first and second sections which, with the third, embody the substance of the new legislation, seem to be framed with the special object of leaving a litigant all the means which he theretofore possessed of establishing title by user, while giving him, in certain cases additional facilities. Each of these sections relates to a "claim which may be lawfully made at the common law by custom, prescription, or grant." These words are not technically appropriate to a claim founded on the modern doctrine of lost grant, which Lord

Appeal. 1899. HANNA v. POLLOCK. Holmes, L.J.

Blackburn says must have originated after 1623, and which he is unable to trace to an earlier date than 1761 (1). Moreover the enactments thus introduced—namely, that no such claim, as aforesaid, after there has been actual enjoyment of the matter claimed for thirty years under the first section, or twenty years under the second, shall be defeated or destroyed by showing only that it was first enjoyed prior to these respective periods—would not be relevant to a claim, one of the essential features of which was that it could not be defeated by merely showing that the user relied on began within legal memory, provided that it had continued for twenty years.

The inference from these provisions, as well as from the other sections, is that the statute is confined to amending the common law of prescription, and that this is done by giving a statutory mode of prescription *in addition* to the methods then existing for establishing rights by evidence of enjoyment. In *Aynsley* v. *Glover* (2), Mellish, L. J., having referred during the argument to the every day practice of pleading—1, enjoyment for twenty years before action; 2, enjoyment for forty years before action; 3, enjoyment from time immemorial; and 4, lost grant—says in his judgment: "The statute 2 & 3 Wm. 4, c. 71 has not, I apprehend, taken away any of the modes of claiming easements which existed before the statute." If this be law (and it forms the *ratio decidendi* in the case), it is decisive of the question now under consideration in a Court bound by the decision in *Deeble* v. *Linehan* (3).

There is, however, the earlier case of *Bright* v. *Walker* (4), an authority always referred to in this connexion, and one which cannot be ignored in any discussion of the subject. There the question of a right of way arose between two leaseholders under a bishop. I gather from Baron Parke's judgment that, prior to the Act, the owner of the tenement would, or might, in the same state of facts have been held entitled to the right claimed over the servient tenement

(1) *Angus* v. *Dalton*, 6 App. Cas. 812.
(2) L. R. 10 Ch. App. 283.
(3) 12 I. C. L. R. 1.
(4) 1 C. M. & R. 211.

during the residue of the lessee's interest therein; but the Court decided that as the law stood after the statute, such a claim could not be sustained. Now, in so far as the plaintiff's alleged right, based, be it observed, on an enjoyment for *twenty* years, depended on the recently passed Prescription Act, I am not to be understood as casting any doubt on this decision. To this extent it has been approved of by subsequent judicial critics, and can be supported by very persuasive reasoning. But the judgment goes much further than this, for it lays down that the qualified right, which before the statute might have arisen from the presumption of a lost grant by one termor to the other, could no longer be inferred from enjoyment for twenty years. "Since the statute," says Baron Parke, "such a qualified right is not given by an enjoyment for twenty years, for in the first place the statute is for shortening the time of prescription, and if the periods mentioned in it are to be deemed new times of prescription, it must have been intended that the enjoyment for these periods should give a good title against all, for titles by immemorial prescription are absolute and valid against all. They are such as absolutely bind the fee in the land, and in the next place the statute nowhere contains any intimation that there may be different classes of rights, qualified and absolute, valid as to some persons, and invalid as to others."

Although the second of these propositions is inconsistent with the judgment of this Court in *Beggan* v. *M'Donald* (1), I am of opinion that if the passage quoted had been confined to a claim under the Prescription Act, based on twenty years' user, it is an accurate statement of the law; but there appears to me to be a manifest fallacy in assuming that the new terms of prescription were to supersede all the former methods by which rights could be acquired by user. I have already endeavoured to show that this is not the true construction of the statute, and I have pointed out that the contrary view was afterwards taken by Mellish, L.J., and James, L. J., in *Aynsley* v. *Glover* (2).

I now proceed to consider to what extent *Bright* v. *Walker* (3), in so far as it relates to the doctrine of lost grant, has been followed in subsequent practice and by later authority. The logical

(1) 2 L. R. Ir. 560. (2) L. R. 10 Ch. App. 283. (3) 1 C. M. & R. 211.

Appeal.
1899.
HANNA
v.
POLLOCK.
Holmes, L.J.

consequence of Baron Parke's judgment was to banish from our law the fiction of lost grant. But pleadings with which we have been long familiar show that this result has not followed; and it is—at least in Ireland—as often acted on at the present day as at any period of the century and a-half of its legal history.

There has been, I think, no subject in modern times that has received fuller judicial consideration than this question of lost grant in the case of *Angus* v. *Dalton* (1)—first, in 1877 by three Judges in the Queen's Bench Division, again in 1878 by the Court of Appeal (2), consisting also of three members, and finally in 1881 by the House of Lords, assisted by seven Judges. The case gave rise to great difference of opinion, to which it is unnecessary for me to refer; but I have not been able to find in it the trace of suggestion that the doctrine of lost grant had been affected by the Prescription Act. It is referred to by every Judge. Its introduction into our jurisprudence by judicial authority at a comparatively recent time, is condemned by some of the Judges and defended by others; but all agree that it had taken a place in English law, from which it could only be removed by legislation. The very matter with which I am now dealing, although not strictly relevant to the points in controversy, is not passed over. Cockburn, C. J. (3), after using some of the arguments I have ventured to offer, says, "The only conclusion, therefore, at which I can arrive, is that as regards the effect of twenty years' user in enjoyment in the matter of easements by presumed grant, the law stands exactly as it did before the passing of the Act." Cotton, L. J. (4), referring to the means by which an easement is capable of being acquired independently of the Prescription Act says, "They are either an enjoyment beyond living memory, from which in the absence of evidence to the contrary, enjoyment before the time of legal memory would be presumed, or by enjoyment for such a time as would be sufficient in the absence of evidence to the contrary to justify a presumption of a modern grant that has been lost." Lord Blackburn is as distinct as Cockburn, C.J. (5).

(1) 3 Q. B. D. 85.
(2) 4 Q. B. D. 162.
(3) 3 Q. B. D. p. 119.
(4) 4 Q. B. D. p. 185.
(5) 6 App. Cas. 814.

He says, "Lord Tenterden's Act, so far as it went, made that a direct bar, which was before only a bar by the intervention of a jury and the use of an artificial fiction of law. But it did not abolish the old doctrine; if it had, old rights even from time immemorial would have been put an end to by unity of occupation for the space of a year. But this is not done: see *Aynsley* v. *Glover* (1). I think the law, as far as regards this subject, is the same as it was before that Act was passed."

The only authority subsequent to *Bright* v. *Walker* (2) that adopts in its entirety the reasoning in that case, is *Wheaton* v. *Maple and Co.* (3). Speaking of a lost grant from a lessee, Lindley, L. J. says, "Although such a grant commensurate with his lease might be inferred as a fact, if there was evidence to justify the inference, there is no legal presumption as distinguished from an inference in fact, in favour of such grant." The action was one for obstructing ancient lights, and in an earlier part of his judgment, the Lord Justice says in reply to the argument, that a grant of the easement ought to be presumed, "no such grant is required to account for the state of things which exists, nor is any fiction or presumption necessary to render legal conduct of the plaintiff which would have been illegal without it. The plaintiff has simply been enjoying his own property as he was perfectly entitled to do." This proposition got rid of the very foundation for the presumption; and when the Lord Justice afterwards referred to this branch of the law, he naturally deals with it somewhat perfunctorily. For example, he says, "I am not aware of any authority for presuming as a matter of law, a lost grant by a lessee for years in the case of ordinary easements, and I am not prepared to introduce another fiction to support a claim to a novel prescriptive right." He here seems to have forgotten that according to *Bright* v. *Walker* (2) itself, this was the law before the Prescription Act; and he had probably never heard of *Deeble* v. *Linehan* (4), or *Timmons* v. *Hewitt* (5). Indeed, much that is said both by him and the other Judges cannot, as far as I can see, be reconciled with *Beggan* v. *M'Donald* (6) in

(1) L. R. 10 Ch. App. 283.
(2) 1 C. M. & R. 211.
(3) [1893] 3 Ch. 48, p. 63.
(4) 12 I. C. L. R. 1.
(5) 22 L. R. Ir. 627.
(6) 2 L. R. Ir. 560.

Appeal. 1899.

HANNA v. POLLOCK.

Holmes, L.J.

this country, and this naturally weakens its authority as far as we are concerned.

I now turn from England to Ireland, where either from the mode in which land is held, or from the character of the people, there is probably more litigation about easements than in any other part of the empire. The current of decision in this country has not been favourable to the view taken in *Bright* v. *Walker* (1) of the effect of the Prescription Act upon the doctrine of lost grant. That statute became law in Ireland on the 1st January, 1859, and in 1861 the subject was exhaustively treated by Pigot, C.B., in *Wilson* v. *Stanley* (2). He was evidently unable to follow the reasoning in *Bright* v. *Walker* (1), but sitting in a Court of co-ordinate jurisdiction, he felt bound by it as an authority. At the same time he criticised it very freely. He pointed out that while even in England the Prescription Act as therein expounded had materially abridged the rights previously resulting from long enjoyment, the change in the law would have a far more serious effect in Ireland in consequence of the different circumstances of the two countries. If this were so in 1861, how much more reason is there for repeating it now when through intervening legislation the ordinary Irish agricultural tenant, although presumably holding for a term of years, enjoys practically fixity of tenure?

The inconvenience and confusion that must have arisen in Ireland, if Baron Parke's propositions had been accepted, led to their being often disregarded in practice. Actions relating to easements were especially common on the circuit of which I was a member. They were generally small cases, which would now be disposed of in the Civil Bill Court under its extended jurisdiction; and although counsel asked for a direction on the authority of *Bright* v. *Walker* (1) where it applied, as it often did, I never remember it given. The verdict of the jury settled them, and the litigants had not the means or inclination to bring them further. *Love* v. *Taylor* (3) was in its time a well-known case, famous for the sturdy spirit of both plaintiff and defendant. I held a brief in it at six Assizes, at three of which it was tried out; but the jury always disagreed. It was tried again on either one or

(1) 1 C. M. & R. 211. (2) 12 I. C. L. R. 345. (3) Unreported.

two occasions after I had left the circuit, with the same result. It was known to counsel on both sides that unless the passages I have quoted from *Bright* v. *Walker* (1) were disregarded, there must be judgment for the plaintiff; but successive Judges, although strongly pressed for a direction at the plaintiff's risk, declined to give it. At length the late Lord Justice Barry announced his intention to direct, whereupon the parties, finding that the battle would be transferred to another field, agreed to refer the whole subject in dispute to arbitration, which resulted, I believe, in a bad award. I have often thought that if judges and counsel had felt any real confidence in the soundness of the law laid down in *Bright* v. *Walker* (1), this long and expensive litigation would have been avoided, or curtailed. At length the very point now before us arose in the Exchequer Division in *Timmons* v. *Hewitt* (2), under somewhat peculiar circumstances. The action was tried by me; and the question of lost grant was not discussed at the trial. The experience of *Love* v. *Taylor* (3) had led me, when hearing civil bill appeals, or sitting at *Nisi Prius*, to follow rigidly *Bright* v. *Walker* (1), except in such points as are plainly inconsistent with later authorities. The counsel were aware that I should have declined to frame a question for the jury based on the doctrine of lost grant, and this was probably involved in my refusal to have a finding as to user for twenty years. My first question was put in pursuance of the judgment in *Fahey* v. *Dwyer* (4). My second, which is not connected with anything dealt with in *Bright* v. *Walker* (1), would have disposed of the case if an answer to it in the affirmative could have been supported. But for reasons to which I need not refer, it was very difficult to support an affirmative answer; and I have no doubt that it was this which led counsel to press so strongly, and the Court to consider so fully, the first question. It is clear that the Exchequer Division had the gravest doubt as to *Fahey* v. *Dwyer* (4), doubts which I fully share; and hence it made use of the first finding to support a proposition which it laid down in the following terms:—"Where two parcels of land are held under a common landlord by tenancies, each of which has existed for

(1) 1 C. M. & R. 211.
(2) 22 L. R. Ir. 627.
(3) Unreported.
(4) 4 L. R. Ir. 271.

Appeal. 1899. HANNA v. POLLOCK. Holmes, L.J.

upwards of twenty years, it is competent for the jury to infer, from twenty years' enjoyment as of right and without interruption of an easement claimed by the owner of one of the tenements over the land of the other tenement, a grant by deed from one tenant to the other tenant of such easement." The Divisional Court made this principle a distinct ground for upholding the verdict, although it was also of opinion that the answer to the second question would have supported it. This Court, on appeal, upheld the judgment; but I believe, in doing so, it neither affirmed nor dissented from the proposition I have quoted.

In *Timmons* v. *Hewitt* (1) there was no finding of a lost grant by the jury; and as I have already explained, there was no intention to put such a question. In the circumstances of that case, this point was merely formal. Having found the user, the jury ought to have presumed a lost grant, and would undoubtedly have done so, if the law had been explained to them. I have no doubt, however, that the proper course is to submit to the jury a definite question on the subject, as was done in the present case by the Chief Baron. The presumption is not "juris et de jure"; and it may be rebutted. It ought probably to be made in all cases where the only relevant circumstance proved is uninterrupted user for twenty years before action; and it cannot be rebutted by merely showing that in point of fact no grant was executed. In most, if not in all, cases the fact that would rebut the presumption would also show that the "user" had not been of right; but it is always desirable to have the question submitted to the jury in precise form, accompanied with such an explanation of the law as is appropriate to the circumstances of the case.

Precisely the same question as was decided in *Timmons* v. *Hewitt* (1) arose in *O'Kane* v. *O'Kane* (2). There the judgment of the Court was based on the course of the trial; but the Lord Chief Justice speaking apparently for his colleagues as well as himself, expresses a very definite opinion. He says:—"We do not formally decide whether one tenant can or cannot confer upon another such a right of way by grant; but we do not see why a tenant from year to year should not be able to grant such a right

(1) 22 L. R. Ir. 627 (2) 30 L. R. Ir. 489

as long as his tenancy lasted. He could, in my opinion, confer by express grant such a right as long as his tenancy subsisted; and as to the doctrine of lost grant, I consider it a very useful one, and I think this case is an example of the salutary effects of this fiction of a lost grant by which a state of things which has existed uninterruptedly for a long series of years can be validated." He then quotes with approbation a passage from the judgment of Lawson, J., in *Tennent* v. *Neill* (1), in which the Judge expresses his opinion that the doctrine is not to be limited, but on the contrary is to be extended by the Courts, and points out that it is not necessary that the jury should believe, as a matter of fact, that such grant was executed.

For the last ten years the law as thus expounded has been acted on without challenge in every Assize Court in Ireland, and even on the present occasion Serjeant Dodd told us that he argued against it with the greatest reluctance. Now that the point is to be decided for the first time by the Court of Appeal, we are obliged to make it the subject of independent consideration. While weighing with respectful deference the reasoning and opinions of the distinguished Judges who have preceded us, and while recognizing the inconvenience and confusion that must follow from altering the rule that has been acted on by the Courts of first instance, I have sought to apply the touchstone of legal principle. Taking the law before the Prescription Act from Baron Parke's exposition of it in *Bright* v. *Walker* (2), and from the judgment of the Exchequer Chamber in *Deeble* v. *Linehan* (3), I hold that in so far as that law relates to the presumption of a lost grant, it remains unchanged. I am compelled to reject Baron Parke's reasoning as founded on an assumption that cannot be supported, and as repugnant to the canons of construction applicable to statutes dealing with private rights. Such rights are not to be abridged by legislation relating to a different subject-matter, unless the intention to do so appears either expressly or by clear intendment, and I can find in the Prescription Act neither the one nor other. As before that statute, it was legally possible to presume from twenty years' user as of right the

(1) I. R. 5 C. L. p. 439. (2) 1 C. M. & R. 211. (3) 12 I. C. L. R. 1.

Appeal. 1899.

HANNA v. POLLOCK.

Holmes, L.J.

grant of an easement by a termor without further evidence, I hold that it is so still, and that therefore there was no objection in legal principle to the questions on this subject left to the jury.

Having arrived at this conclusion on the matter of law, I have little to say about the rest of the case. The Chief Baron, I have no doubt, framed the two questions relating to the grant to Pollock in the form in which they appear, in deference to the suggestion of the Lord Chief Justice in *O'Kane* v. *O'Kane* (1), in which I concur; but he could not have forgotten to instruct the jury that the answer to them depended upon whether there had been user as of right for twenty years. In the case of an artificial watercourse, there could not be such user if the watercourse was in its nature temporary, or if it was not intended to be permanent. If this was not told the jury, it must have been because it was assumed on both sides that the channel made in 1861 was to be permanent. In the absence of any requisition on this subject or objection to the charge, the Court must assume that the findings on questions 1 and 2 negative the temporary theory. This being so, the verdict for the defendant must stand unless there was conclusive evidence that the present channel is temporary only. I have read the careful judgment of Mr. Justice Andrews; and it seems to me to proceed on an assumption which the jury was not bound to make. He says that although the new channel "was an improvement on the old drain, it was clearly of as temporary a character as the old drain, and as open to alteration or abandonment at any time." I could understand this if the old and new channels were field drains and nothing more; but it was open to the jury to take a different view of them. The change of channel originated doubtless in drainage improvement, but it is often part of a drainage scheme to change permanently the course of a natural stream. The water discharged by the channels was the outflow from springs which must reach the river in some way. The old course was probably permanent till it was altered; and I see no reason for the jury not concluding that the substituted one was also intended to be permanent. For some reason it was conceived that the change could not be made without the co-operation

(1) 30 L. R. Ir. 489.

of Pollock, and it was carried out by both tenants acting in combination. The result was to send by means of a weir a portion of the water into Pollock's land, and to discharge the remainder into the river through Hanna's land. It is impossible now to ascertain the cause of this. Each party seemed to obtain a benefit and to incur a burden; and there is no reason for thinking that the arrangement was not regarded as final by both. The jury was the proper tribunal to decide; and this Court is not at liberty to disregard their verdict. As to the question of merger, I adopt the view of Kenny, J., and, like him, I do not think it necessary to consider the 8th and 9th sections of the Purchase of Land (Ireland) Act, 1885. These are provisions of great importance; but as they do not form the ground of my judgment, I have formed no final opinion as to their effect.

Having taken the foregoing view of the findings of the jury—a view which, until this morning, I believed was held by the majority of the Court—I could not have avoided considering the legal questions to which the greater part of my observations has been directed. I may, however, add that I should not have felt myself relieved from this duty, even if I had agreed with my brethren in their conclusion as to the evidence and verdict. It would, I think, have been a matter for regret if this Court had for the second time refrained from expressing its opinion upon such an important legal problem as that raised in *Timmons* v. *Hewitt* (1), and in the present case.

Solicitor for the plaintiff: *J. K. Currie.*
Solicitor for the defendant: *L. E. R. Martin.*

R. D. M.

(1) 22 L. R. Ir. 627.

Q. B. Div. 1900.

June 15, 20.

REG. (HOLYWOOD) *v.* JUSTICES OF CO. LOUTH (1).

"*Workman*"—*Hairdresser—Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90).

A hairdresser is not a "workman" "engaged in manual labour" within sect. 10 of the Employers and Workmen Act, 1875.

CERTIORARI.

Motion to make absolute a conditional order for a writ of *certiorari*, to remove and quash an order of conviction made by the respondent justices at petty sessions, on the 4th May, 1900. The applicant (Holywood) was apprenticed to a hairdresser, and, having left his master's employment, the master obtained a justices' order, under sect. 6 of the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), directing him to return. Holywood did not obey this order, and, on a summons at his master's suit, was summarily convicted and sentenced to a term of imprisonment under the same section of that Act.

M'Loone, for the applicant.

Cuming, for the justices.

In addition to the authorities cited in the judgment, the following were referred to: *Hunt* v. *Gt. N. Ry. Co.* (2); *Bound* v. *Lawrence* (3); *Phillips* v. *Innes* (4); *Grainger* v. *Aynsley* (5); *Ex parte Gordon* (6).

Cur. adv. vult.

June 20.

The judgment of the Court was delivered by—

PALLES, C.B.:—

The only question which has been argued in this case is whether a hairdresser is a "workman," within the meaning of "The Employers and Workmen Act, 1875." By sect. 10

(1) Before PALLES, C.B., ANDREWS and JOHNSON, JJ.
(2) [1891] 1 Q. B. 601.
(3) [1892] 1 Q. B. 226.
(4) 4 Cl. & F. 234.
(5) 6 Q. B. D. 182.
(6) 25 L. J. M. C. 12.

of this Act "workman" is defined to mean, "any person who, being a labourer, servant in husbandry, journeyman, artificer, *handicraftsman*, miner, or *otherwise engaged in manual labour*, has entered into or works under a contract with an employer."

In my opinion a hairdresser is a "handicraftsman"; and, therefore, if that word is used in the above section in its ordinary sense, and uncontrolled by the context, a hairdresser would be "a workman," within the meaning of the Act. But if this word be thus read without reference to the context, no effect will be given to the word "otherwise"; and, for this reason, I am of opinion that the words "engaged in manual labour" control all the previous expressions, as if they were, "who being engaged in manual labour, as a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise, has entered into or works under a contract with an employer." This was the view of Brett, M. R., in *Morgan* v. *London General Omnibus Company* (1). There he said:—"The word 'otherwise,' used in the earlier enactment, shows that the statutes were intended to apply only to those engaged in manual labour. They do not extend to any others."

The word "handicraftsman" being thus controlled by construction, it is not sufficient for the prosecutor here to show merely that a hairdresser is a handicraftsman; he must go on, and show that he is, as such, engaged in "manual labour."

Now, no doubt the occupation of a hairdresser involves manual work; but the question is whether work of such a character as is involved in the ordinary occupation of a hairdresser is "labour," within the meaning of the statute. Upon that question there are decisions, including some of the Court of Appeal in England, which it is impossible that we can disregard.

In *Cook* v. *North Metropolitan Tramways Company* (2), A. L. Smith, J., says: "The expression used, it should be noted, is not 'manual work,' but 'manual labour': for many occupations involve the former, but not the latter, such as telegraph clerks, and all persons engaged in writing." There it was held that the

(1) 13 Q. B. D. 832. (2) 18 Q. B. D. 683.

Q. B. Div. 1900.

THE QUEEN v. JUSTICES OF LOUTH.

Palles, C.B.

driver of a tramcar was not "a workman," within the meaning of the Act.

In *Yarmouth* v. *France* (1), the plaintiff was in the service of a wharfinger, and his duty was to drive the carts used for the purpose of the business, and to load and unload the goods which were carried in them. He was held, and if I may venture to say so with deference, in my opinion rightly held, to be "a workman" within the Act of 1875. But the reasons of the Judges in arriving at that conclusion, and differentiating the case from *Cook* v. *North Metropolitan Tramways Company* (2), and *Morgan* v. *London General Omnibus Company* (3), throw much light upon the construction of the Act. "He," says Lord Esher, M.R., "is a man who drives a horse and trolley for a wharfinger. We must take into account what his ordinary duty was. He has to load and unload the trolley: that is manual labour. His duty may be compared to that of a lighterman, who conducts a barge or lighter, up and down a river. Driving the horse and trolley, and the navigating of the lighter, form the easiest part of the work. *His real labour, that which tests his muscles and his sinews*, is the loading and unloading of the trolley or the lighter." In the same case, Lindley, L. J., says: "His duty was not only to drive, but also to load and unload the goods which had to be transported on the trolley which it was his business to drive. This loading and unloading requires bodily labour and exertion, and brings the case within the statutory definition of a workman."

Construing "manual labour," as used in the Act in question, by the light of these decisions, and distinguishing it, as by them I am obliged to do, from manual "work," I am of opinion that the use of the hands which is involved in the ordinary occupation of a hairdresser, although manual work, does not require such expenditure of physical energy as is necessary to render it manual "*labour*" within the meaning of the section.

I am, therefore, of opinion that the Justices had not jurisdiction to entertain the complaint, and that the *certiorari* must go.

Solicitor for applicant: *R. Dickie.*
Solicitor for respondents: *Moynagh.* A. E. R. J.

(1) 19 Q. B. D. 647. (2) 18 Q. B. D. 683. (3) 13 Q. B. D. 832.

INDEX.

ABANDONMENT—Infant—Right to custody of *See* INFANT. [232

ABSOLUTE INTEREST—Marriage articles *See* ESTATE FOR LIFE. [441

ACT OF BANKRUPTCY—Notice—Equitable mortgage of shares - - 153 *See* ORDER AND DISPOSITION.

ACTION TO RECOVER POSSESSION OF LAND—*Non-payment of rent—Execution—Sect. 12 of Land Law (Ireland) Act*, 1896—*Portion of holding in hands of immediate landlord.*] A caretaker's notice under sect. 7 of the Land Law (Ireland) Act, 1887, is the proper method of execution of a judgment in ejectment for non-payment of rent against "an immediate landlord" who retains portion of a holding in his own hands, but has let the remainder to under-tenants, entitled to retain possession as immediate tenants to the head landlord under sect. 12 of the Land Law (Ireland) Act, 1896. *Craig* v. *McCullagh and Baird* - - - - - Q. B. 136

—— Non-payment of rent—Special indorsement—Amendment - - - - - 505 *See* SPECIALLY INDORSED WRIT.

AGISTMENT—Expense of—Live stock—*Fi fa*—Sheriff - - - - - 586 *See* INTERPLEADER.

AMENDMENT—Indorsement of writ—Ejectment for non-payment of rent - 505 *See* SPECIALLY INDORSED WRIT.

ANIMALS—Feræ naturæ—Trespass - 632 *See* FERÆ NATURÆ.

APPEAL—*Notice of—Conviction by Justices—Fishery Acts—Service on solicitor of party—Duration of solicitor's authority—Petty Sessions (Ireland) Act*, 1851 (14 & 15 *Vict. c.* 93), *sect.* 25, *subsect.* 5.] Notice of intention to prosecute an appeal against a conviction under the Fishery Acts was served upon the solicitor who had appeared for the complainant at Petty Sessions:—*Held* that, his retainer having come to an end upon the making of the order at Petty Sessions, he had no authority to accept service of the notice of appeal, and that there was no valid service of the notice. *Reg.* v. *Justices of Oxfordshire* ([1893] 2 Q. B. 149) followed. *Reg.* (*Hamilton*) v. *Chairman and Justices of County Leitrim*) - - - - - - Q. B. 397

2. —— *Prohibition—Justices—Quarter Sessions—Case stated by Justices*—20 & 21 *Vict. c.* 43, *ss.* 6, 14—*Finality of the decision of the Superior Court.*] *D.* was summoned before Justices, under the Fisheries Acts, for not making, and for not maintaining, a legal free gap in his weir at Lismore. The Justices, in January, 1899, convicted him for not making the free gap, and imposed a fine of £1000, their order being silent as to the second count—for not maintaining it. At *D.'s* request they stated a case for the opinion of this Division, setting out that, as they had convicted the defendant for not making the gap, they considered they could not also convict for not maintaining it, but that, if wrong in this, they were of opinion that the gap had not been legally maintained in certain particulars. The Court reversed the conviction for not making, but remitted the case to the Justices with an expression of their opinion that, by reason of a certain finding of fact in regard to the non-maintenance of the gap, the Justices ought to convict the defendant for not maintaining it, and should impose in respect thereof such penalty as was right. Thereupon, on the 29th July, the Justices at Petty Sessions made an order of conviction imposing on the defendant a penalty of £54. The defendant appealed from this order to Quarter Sessions. The prosecutor, on the 13th September, obtained a conditional order for a writ of prohibition, directed to the Chairman and Justices, who, when the Quarter Sessions subsequently met on the 20th September, adjourned the matter pending the decision of the Court whether prohibition should go. On motion to make the order absolute:—*Held* (Murphy, J., dissenting), that the "final and conclusive" effect of the decision of the High Court upon the case stated, and the "abandonment," by the acceptance of the case, of the alternative right of appeal to Quarter Sessions from the conviction of January, 1899, did not preclude the defendant from appealing to Quarter Sessions from the Justices' subsequent

APPEAL—*continued.*
order of the 29th July. *Quære*, Was the application for the writ of prohibition premature? *Reg.* (*Drohan*) v. *Justices of County Waterford* - Q. B. 307

APPOINTMENT—New trustee—Vesting stock—Stamp - - - - - - 138
See TRUSTEE.

APPORTIONMENT—Crown rent—Exclusive charge—Sale to tenants - 259
See CROWN RENT.

APPRENTICE—Discontinuance of business—Arranging debtor—Compensation for fee
See ARRANGING DEBTOR. [415

ARRANGING DEBTOR — *Discontinuance of business — Apprenticeship fee — Compensation to apprentice—Jurisdiction.*] Where a person to whom an apprentice has been bound petitions the Court for an arrangement, and intends to abandon his business, the Court has jurisdiction under the Irish Bankrupt and Insolvent Act, 1857, section 353, where the circumstances of the case render it reasonable, to refuse to sanction the arrangement until so much of the apprenticeship fee is repaid to the apprentice, as would be ordered to be refunded to him if the proceedings were in bankruptcy. *In re M.* - - - - - Q. B. (BANKCY.) 415

ARREARS OF RENT ACT, 1882 — Vesting order—Rentcharge whether merged 556
See VESTING ORDER.

ARTIFICIAL CHANNEL — Watercourse — Prescription - - 325, 340, 664
See EASEMENT. 2.
WATERCOURSE.

ATTACHMENT OF DEBTS.
See RECEIVER.

BANKRUPTCY—*Practice—Sale by Court—Consent signed by the assignees and mortgagee for sale according to the course of the Court—Conditions of sale—Rent and outgoings to be paid up to last gale day preceding the sale—Assignees' account—Proper deductions.*] Where property of a bankrupt was mortgaged and a consent was signed by the assignees and mortgagees thereon that the property should be sold according to the course of the Court, and the net proceeds of the sale should be distributed under the order of the Court, and the conditions of sale provided that the rent and other outgoings should be paid up to the last gale day preceding the sale, the amount of rent due up to the last gale day, and the municipal and non-municipal rates, are proper debits against the proceeds of the sale, and should not be charged against the general estate of the bankrupt. *In re Greene* [Q. B. (BANKCY.) 433

—— Arranging debtor—Apprenticeship fee—Compensation - - - - - 415
See ARRANGING DEBTOR.

BANKRUPTCY—*continued.*
—— Debtor's summons—Judgment against married woman - - - - - - 439
See DEBTOR'S SUMMONS.

—— Order and disposition—Shares - 153
See ORDER AND DISPOSITION.

BREACH OF CONTRACT—Statute of Frauds—Part performance - - - 478
See FRAUDS, STATUTE OF.

BUILDING—Lateral support—Knowledge of easement - - - - - - 269
See EASEMENT. 1.

BUILDING GROUND—Resumption of holding—Evidence - - - - 262
See RESUMPTION OF HOLDING.

CARRIERS — *Through booking of goods to be carried over several railways—Condition limiting liability of contracting Company to wilful misconduct of its servants on its own line—Validity of the condition*—Onus *of proof.*] Where there is a through booking of goods which necessitates their being carried over lines owned by different companies, a condition limiting the liability of the contracting company to wilful misconduct of its servants on its own line is valid. When the goods are damaged in transit the *onus* of proving that they were not damaged by the wilful misconduct of the servants of the contracting company on its line lies on the contracting company. *Mahony* v. *Waterford, Limerick and Western Railway Company* [Q. B. 273

CASE STATED—Superior Court—Finality of decision - - - - - 211, 307
See APPEAL. 2.
FISHERY ACTS. 2.

CASES—*Attorney-General* v. *Dodington* ([1897] 1 Q. B. 722; 2 Q. B. 373), discussed and applied - - - - - 281, 400
See ESTATE DUTY.

—— *Booth* v. *Briscoe* (2 Q. B. D. 496) considered and explained - - - - - 265
See LIBEL.

—— *Bright* v. *Walker* (1 C. M. & R. 211) followed by Fitz Gibbon, L.J. - - 664
See EASEMENT. 2.

—— *Gordon* v. *Street* ([1899] 2 Q. B. 641), followed
See PROMISSORY NOTE. [628, 631

—— *Hosford, Appellant*; *Mackey, Respondent* ([1897] 2 I. R. 292) distinguished 391
See MASTER AND SERVANT.

—— *Reg.* (*Lambe*) v. *Armagh* (*Justices of*) ([1897] 2 I. R. 57), applied - - - 492
See LICENSING ACTS. 2.

—— —— (*Cox*) v. *Dublin* (*Recorder of*) (16 L. R. I. 424) applied - - - - 492
See LICENSING ACTS. 2.

—— —— v. *Oxfordshire* (*Justices of*) ([1893] 2 Q. B. 149) followed - - 397
See APPEAL. 1.

CASES—*continued.*
—— *Scott* v. *Morley* (20 Q. B. D. 120) form of judgment in, considered - - . 439
See DEBTOR'S SUMMONS.
—— *Smurthwaite* v. *Hannay* ([1894] A. C. 494) followed - - - - - 265
See LIBEL.
—— *Wilson* v. *Stanley* (12 Ir. C. L. R. 345) followed by Fitz Gibbon, L. J. 664
See EASEMENT. 2.
CAVEATOR—Temporary residence within jurisdiction—Security for costs - 560
See SECURITY FOR COSTS.
CENSUS—Evidence—Public document - 88
See WATERWORKS.
CERTIFICATE.— Fishery Commissioners — Fixed net—Free gap - 161, 211
See FISHERY ACTS. 1, 2.
—— Excise license—Notice of intention to apply for - - - - - - 388
See LICENSING ACTS. 1.
—— Licensing Acts—Conduct of business 492
See LICENSING ACTS. 2.
—— Shares—Bankruptcy - - - 153
See ORDER AND DISPOSITION.
CERTIORARI—*Estoppel—Judgment—Application to quash order of Inferior Court refused—Grounds of decision different—Mistake of law.*] Prior to December, 1889, the plaintiff was entitled to receive from the defendant a tithe rentcharge of £4 1*s*. 5*d*. per annum out of the lands of *B*., in the county of Limerick. In December, 1889, the defendant applied to the Chairman and Justices of the county to vary this tithe rentcharge, and by order of Quarter Sessions, dated 30th December, 1889, it was reduced to £1 19*s*. 1*d*. The plaintiff then obtained from the Queen's Bench Division a conditional order for a writ of *certiorari* to quash the order of the Quarter Sessions; but on the 15th May, 1890, on cause shown, the conditional order was discharged. From May, 1890, until the decision of the Court of Appeal in *Regina* (*Metge*) v. *Justices of Meath* ([1898] 2 I. R. 592), on the 28th January, 1898, the defendant paid to the plaintiff, and the plaintiff accepted from him, tithe rentcharge at the rate of £1 19*s*. 1*d*. It was admitted that the *Dublin Gazette* did not from 1887 to 1889 contain any publication of the average prices of corn, but the absence of such publication was not the ground upon which the order reducing the tithe rentcharge had been impeached. After the decision of *Metge's Case* the plaintiff sued the defendant to recover the difference between £4 1*s*. 5*d*., and £1 19*s*. 1*d*., for the years from 1890 to 1898. On a case stated:—*Held* (affirming the decision of the Queen's Bench Division), 1, that the plaintiff was not estopped by the order of the Queen's Bench Division of the 15th May, 1890, from alleging that the order of
CERTIORARI—*continued.*
the 30th December, 1889, was bad; and 2, that the plaintiff was entitled to recover six years of the arrears which had accrued prior to the commencement of the suit. *O'Grady* v. *Synan* [Q. B. 602; App. 610
CHILD—Custody of - - - - 232
See INFANT.
CIVIL BILL.
See COUNTY COURT.
COMMISSIONERS — Fisheries — Decision, whether judgment *in rem* - 161
See FISHERY ACTS. 1.
COMPANY—Fraud—Prospectus - - 1
See MISREPRESENTATION IN PROSPECTUS.
—— Railway.
See RAILWAY COMPANY.
—— Shares—Equitable mortgage - 153
See ORDER AND DISPOSITION.
COMPENSATION — Arranging debtor — Apprenticeship fee - - - 415
See ARRANGING DEBTOR.
—— Judicial tenancy — Compulsory purchase — Mode of ascertainment - - 105
See COMPULSORY PURCHASE.
—— Loss of office—Solicitor of Grand Jury 351
See SOLICITOR.
—— Malicious injury to property—24 & 25 Vict. c. 97—61 & 62 Vict. c. 37, s. 5 - 592
See MALICIOUS INJURY.
COMPULSORY PURCHASE — *Defence Acts*, 1842 *to* 1892—*Lands Clauses Consolidation Acts*, 1845, 1860—*Lands taken compulsorily—Notice to treat—Compensation—Persons having "no greater interest than as tenant for a year or from year to year"—Tenant from year to year at a judicial rent—Justices—Jurisdiction—Defence Act*, 1842 (5 & 6 *Vict. c.* 94)—*Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18)—*Lands Clauses Consolidation Amendment Act*, 1860 (23 & 24 *Vict. c.* 106)—*Defence Act*, 1860 (23 & 24 *Vict. c.* 112)—*Land Law* (*Ireland*) *Act*, 1881 (44 & 45 *Vict. c.* 49), *ss.* 5, 8, 13.] The Secretary for War, requiring certain lands for the defence of the realm, served a notice, dated 7th March, 1898, calling upon the occupying tenants to treat for the purchase of same, and to send in particulars of their claims. Mary Sullivan, a tenant on whose holding a fair rent had been fixed, sent in a claim, but declined to accept the amount of compensation subsequently offered to her. In October, 1898, she was served with a summons, calling upon her to attend at Petty Sessions, before two Justices, for the purpose of hearing and determining the question of the disputed compensation. She appeared by her solicitor, who objected to the jurisdiction. Four Justices adjudicated, and, being of opinion that they had no jurisdiction, dismissed the case. The Defence Act, 1842, provides that if for a space of

COMPULSORY PURCHASE—*continued.*
fourteen days after notice to treat, the parties interested fail to treat or agree, certain steps may be taken to put the War Department into immediate possession of the lands required, and to have the compensation assessed by a jury. The Lands Clauses Act, 1845, provides that, if for a space of twenty-one days after notice served the parties do not treat and agree, then (section 121) "if any such lands shall be in the possession of any person having no greater interest therein than as tenant for a year or from year to year, the amount of such compensation shall be determined by two Justices in case the parties differ about the same." The Lands Clauses Act, 1860 (23 & 24 Vict. c. 106), by section 7, provides that, for the purchase of any lands wanted for the defence of the realm, it shall be lawful for the Secretary for War to use the provisions of the Act of 1845, but that this shall not affect his powers under the Defence Acts. The Defence Act, 1860 (23 & 24 Vict. c. 112) provides, sect. 12 ("determination of amount of compensation otherwise than by agreement"), that if, for fourteen days after service of the notice therein mentioned, a party interested fail to treat or agree, the amount of compensation "shall be settled by a jury in like manner as if the same were compensation for lands surveyed" under the Defence Act of 1842; and sect. 46 provides that the provisions of this Act in regard to serving notices, and concerning the determination of the amount of compensation for land otherwise than by agreement, shall be applicable where lands are surveyed and marked out under the Defence Act, 1842. A conditional order for a writ of *mandamus* commanding the Justices to entertain the case having been obtained, and Mary Sullivan having moved to discharge the same:—*Held*, that a tenancy from year to year, on which a "fair rent" had been fixed by the Irish Land Commission for a statutory term, is not such a yearly tenancy as was contemplated by sect. 121 of Lands Clauses Act, 1845, and that the conditional order must be discharged. *But held*, by Sir P. O'Brien, L.C.J., and Gibson J., that the procedure under the Defence Act, 1860, is cumulative, and does not exclude the use of the Lands Clauses Act, 1845, under the powers given by the Lands Clauses Act, 1860, section 7. *Quære* (*per* Gibson, J.) as to the effect of using the procedure under the Lands Clauses Code and under the Defence Code concurrently. *Held further*, that as the notice to treat (though it mentioned fourteen days) had not been acted upon for more than twenty-one days, it would have been sufficient, in a proper case, to found the jurisdiction of the Justices under sect. 121; and further, that the objection, if any, had been waived. *Reg.* (*Secretary of State for War*) v. *Justices of County Cork* - - Q. B. 105

CONCEALMENT—Identity of lender
See PROMISSORY NOTE. [628, 631

CONDITIONS — Railway Company—Through booking - - - - - 273
See CARRIERS.

CONDITIONS OF SALE — Bankruptcy—Mortgaged premises - - 433
See BANKRUPTCY.

CONSENT—Subletting without—Implied covenants for title - - - 359, 370
See SUBLETTING.

CONVENT—Nuns—Franchise - - 455
See PARLIAMENT.

COSTS—Crown—Petition of right - 513
See NATIONAL SCHOOL TEACHER.
—— Interpleader—Sheriff - - - - 586
See INTERPLEADER.
—— Municipal election petition — Returning officer - - - - - - 384
See ELECTION PETITION.
—— Security for—Caveator—Temporary residence within jurisdiction—Costs of motion 560
See SECURITY FOR COSTS.

COUNTY COUNCIL—Election—Personation
See PERSONATION. [304
—— Election petition—Returning officer—Costs
See ELECTION PETITION. [384

COUNTY COURT—Dismiss on merits—Estoppel
See ESTOPPEL. [565
—— Interpleader—Service out of the jurisdiction [619
See SERVICE OUT OF THE JURISDICTION.

COVENANT—Implied—Void subletting
See SUBLETTING. [359, 370

CRIMINAL LAW — Personation — County Council election - - - 304
See PERSONATION.

CROWN—Costs to—Petition of right 513
See NATIONAL SCHOOL TEACHER.

CROWN RENT—*Landlord and tenant—Land Purchase Acts—Exclusive charge of quit rent—Jurisdiction of Land Commission—Incorporation of statutes—Landed Estates Court Act, sect.* 68—*Land Purchase Act*, 1885, *sect.* 10—*Crown Lands Act*, 1894, *sect.* 12.] The Land Commission has jurisdiction to charge the whole of any quit rent or other perpetual Crown rent on part of the lands charged in exoneration of the residue thereof. Effect of a statute expanding powers of a statute previously incorporated with another statute. *In re Marti* - - - - LAND COM., 259

CUSTODY OF CHILD—Right of mother 232
See INFANT.

DEBTOR'S SUMMONS—*Bankruptcy—Married woman—Judgment—Practice.*] Where a judgment has been obtained against a married woman, in accordance with the form laid down in *Scott* v. *Morley* (20 Q. B. D. 120), the judgment debtor

DEBTOR'S SUMMONS—*continued.*
cannot be adjudged a bankrupt on a debtor's summons, issued on foot of the judgment. *In re Elliott* - - - Q. B. (BANKCY.) 439
DEER—Trespass - - - - - 632
See FERÆ NATURÆ.
DEFENCE ACTS - - - 105
See COMPULSORY PURCHASE.

DEMESNE LAND—*Landlord and tenant—Land Law (Ireland) Act*, 1896, *sect.* 5—*Character of holding.*] By lease dated the 10th January, 1752, the lands of *K.*, in the county of Cork, comprising 204 acres, were demised by *R. T.* to *W. O.* for 990 years, subject to the yearly rent of £126 16*s.* The lessee's interest had been in the possession of the *H.* family for a great number of years, and the premises consisted of a handsome house, a garden, and out-offices, and there was ornamental timber in the lawn and on both sides of the house. In 1868 the place was in the possession of Captain *S. H.*, who by will devised all his property to trustees, upon trust as to the said lands, after providing a jointure for his widow, for his son John *H.*, on his attaining twenty-one, but in case he died under twenty-one, then to his two daughters, May and Frances, as tenants in common, to become vested on their attaining twenty-one; in case of the death of one, then the whole to the survivor; and in case of the death of all his children before attaining age, the testator left all his property to his brothers *J. D. H.* and *R. N. H.* The testator empowered his trustees to make leases of all his lands for any term consistent with the term for which the same were held, at the best and most improved rent; and he made his wife and his trustees executors. Captain *S. H.* died in Dec., 1868, and Mrs. *H.* alone proved the will. On the 11th May, 1872, Mrs. *H.* made a lease of the house and lands to *J. D. H.*, her brother-in-law, for thirty-five years, at £310 a year. *J. D. H.* was a gentleman farmer. He subsequently got into financial difficulties, and died in 1883. The lessee's interest under the lease of the 11th May, 1872, was sold, and bought by *M.* for £1100. In 1887 *M.* served a notice to fix a fair rent, which was dismissed on the ground that the holding was demesne land. On appeal to the Land Commission this decision was affirmed, and the tenant appealed to the Court of Appeal, who dismissed the appeal. After the passing of the Land Law Act, 1896, he served a fresh originating notice:—*Held* (affirming the decision of the Land Commission) that "when first demised" in sect. 5, sub-sect. (1) (*b*) (ii), of the Land Act, 1896, meant first demised in relation to the tenancy, the owner of which was seeking to fix a fair rent:—*Held* also, by the Lord Chancellor, the Lord Chief Justice, the Lord Chief Baron, and Holmes, L.J. (Fitz Gibbon and Walker, L.JJ., *dissentientibus*), that the circumstances of the case

DEMESNE LAND—*continued.*
showed an intention that the lands should be preserved as demesne. *Magner, Tenant; Hawkes, Landlord* (No. 2) - - - APP. 465
DEPOSIT—Certificate of shares—Bankruptcy
See ORDER AND DISPOSITION. [153
DESCRIPTION—Of premises—Application for excise licence - - - - 388
See LICENSING ACTS. 1.
DISMISS—On merits—Estoppel - 565
See ESTOPPEL.
DISPENSARY—Medical officer—Vacation 547
See VACATION.
DUBLIN CORPORATION—Supply of water to townships - - - - 88
See WATERWORKS.

EASEMENT — *Adjoining buildings—Right to lateral support — Prescription — Evidence—Knowledge of support.*] Where an easement of support is claimed by the owner of one of two adjoining houses, which have not a common origin, against the owner of the other, it must be shown that the owner of the servient tenement knew, or had the means of knowing, that his house was affording support to the other. *Gately* v. *Martin* Q. B. 269

2. —— *Artificial watercourse—Enjoyment of, for twenty years—Tenants of common landlord—Prescription Act*, 2 & 3 *Wm.* 4, *c.* 71.] Prior to 1894 (when they purchased their holdings through the Irish Land Commission, *H.* and *P.* were tenants of adjoining farms on the same estate. In 1861 the predecessor of *H.*, for the better drainage of his holding, constructed a drain through his lands to a neighbouring river, and at the same time a weir was constructed on the course of this drain, and a "carry" or conduit, by which some of the water was led in a different direction along *H.'s* side of the boundary between the two farms to the public road, and thence along that road (which ran through *P.'s* holding) supplying a tank on *P.'s* holding with water, and ultimately finding its way to the river at a point lower down its course. In 1896 *H.* altered the drainage of his lands and removed the "carry" so that it no longer supplied *P.'s* tank. *P.* entered on *H.'s* land and restored it. *H.* sued for damages for trespass, obstruction of the watercourse, and for flooding the lands. *P.* justified under an alleged lost grant and by prescription. At the trial the jury found a lost grant, but found there was no flow of water as of right prior to the drainage operations in 1861, and the Judge directed a verdict for the defendant. *Held* by Fitz Gibbon and Walker, L.JJ. (*dissentiente* Holmes, L.J.) affirming the majority of the Queen's Bench Division, that the drain was merely an artificial drain, not of a permanent character, but open to alteration or removal at *H.'s* pleasure, and that *P.'s* enjoyment must be regarded as permissive only. *Held* also, by Walker, L.J., and

EASEMENT—*continued.*
Holmes, L.J., that a lost grant of an easement may be presumed from an enjoyment for twenty years between two tenants, whether holding under the same landlord or not. *Held*, by Fitz Gibbon, L.J., following *Bright* v. *Walker* (1 C. M. & R. 211), and *Wilson* v. *Stanley* (12 Ir. C. L. R. 345), that since the Prescription Act a fictitious grant cannot be presumed as the foundation of a right upon less than forty years user by a termor against a termor. *Hanna* v. *Pollock* - - - App., 664
—— Artificial watercourse - - 325, 340
See WATERCOURSE.

EJECTMENT.
See ACTION TO RECOVER POSSESSION OF LAND.

ELECTION—County Council—Personation
See PERSONATION. [304

ELECTION PETITION — *Local Government (Ireland) Act*, 1898 — *Returning officer — Costs.*] Where a municipal election petition is dismissed with costs, if the money lodged in Court as security for costs be not more than sufficient to discharge the respondent's costs, the returning officer is not entitled to be paid any part of his costs and expenses, incurred under the Local Government Act, 1898, out of that fund, but must look to the petitioners for payment *In re Ennis Election Petition*; *O'Loughlin and others, Petitioners*; *Scanlan, Respondent* - - - - - Q. B. 384

EQUITABLE EXECUTION - - 612
See RECEIVER.

EQUITABLE MORTGAGE — Shares—Bankruptcy - - - - - - 153
See ORDER AND DISPOSITON.

ESTATE DUTY—*Revenue—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *sect.* 5, *sub-sect.* 2—"*Settled property.*"] By marriage settlement dated the 7th October, 1861, certain trust funds were settled upon trust for *A*, the husband for life, with remainder to *B*, the wife, for life, and after the death of the survivor, then, in the event, which happened, of their being no children of the marriage, upon trust as to the capital of the funds for such person or persons as the wife should appoint. The wife died on the 14th March, 1897, and on her death the Inland Revenue claimed, and were paid, estate duty on the value of her reversionary interest in the capital of the trust funds. The husband died on the 14th April, 1897, and the Inland Revenue claimed duty on the entire funds comprised in the settlement:—*Held* (affirming the decision of the Queen's Bench Division), that the duty paid on the death of the wife was in respect of "settled property" within the meaning of sect. 5, sub-sect. 2 of the Finance Act, 1894, and that credit for it should be given as regards the duty, which would otherwise have been payable on the death of the husband. *Held*, also by FitzGibbon, Walker, and

ESTATE DUTY—*continued.*
Holmes, L.JJ., that the principle, which should govern this case, having been already decided by the English Court of Appeal in *Attorney-General* v. *Dodington* ([1897] 2 Q. B. 373), the Court of Appeal in Ireland ought not to differ from that Court on the construction of a statute imposing taxation. *In re Finance Act*, 1894, *and Studdert* [Q. B. 281; App. 400

ESTATE FOR LIFE—*Marriage articles—Informal contract—Interest whether absolute or for life only.*] By an inartificially drawn agreement not under seal, and described as "marriage articles," made between *A* and *B* (his son), both marksmen, and *C* and *D* (*C's* daughter), reciting an intended marriage, afterwards duly solemnized between *B* and *D*, and in further consideration of £70 to be paid by *C* to *B* as *D's* marriage portion, *A* assigned all his interest in a farm of land (treated during the argument as a chattel real), the property of *A*, to *B* and *D*, their heirs and assigns, after the death of *A*, with remainder to the children of the intended marriage, after the death of *B* and *D*; and in case *D* should survive *B*, *A* and *B* transferred and made over the farm to *D* "during the term of the natural life of the said *D*." There were no children of the marriage. *D* survived *A* and *B*. After the death of *A*, *B* and *D*, the plaintiff in the present action, who was personal representative of *A* and *B*, brought this action to recover possession from the legatee of *D*:—*Held*, that *D* was entitled to a life interest only, and that the verdict which had been directed for the plaintiff at the trial should stand. *Fegan* v. *Meegan* - - - - - Q. B. 441

ESTOPPEL — *Judgment by default — Civil bill dismiss on the merits—Tithe rentcharge—Statute of Limitations—3 & 4 Will. 4, c. 27, s. 34—37 & 38 Vict. c. 57, s. 1.*] In the year 1890 the plaintiff sued certain defendants for a sum of £9 11*s.*, six years arrears of tithe rentcharge, payable in respect of certain titheable lands situate in the parish of *G* and county of *T*. The defendants entered no appearance, and judgment was marked by default in the year 1891 for the sum claimed with costs, which the defendants subsequently paid. At the date the writ was issued and payment was made, it was now admitted that the defendants had occupied the lands for twelve years without any payment of, or acknowledgement of liability to, tithe rentcharge. In the year 1899 the plaintiffs sued the defendants in the present case (who are to be taken as representing all the estate and interest of the defendants in the said writ and judgment) by civil bill for five years arrears of the tithe rentcharge, and the County Court Judge dismissed the case on the merits. In the year 1899 the plaintiffs sued the defendants by civil bill for £3 3*s.* 8*d.*, being two years arrears of tithe rentcharge issuing out of

ESTOPPEL—*continued.*
the lands of *B* in the parish of *G* and county of *T*. The County Court Judge dismissed the case on the merits. The plaintiffs appealed to the Judge of Assize, who stated a case raising two questions—1, whether the plaintiffs' claim was barred by the Statute of Limitations: 2. whether the dismiss on the merits in 1896 estopped the plaintiffs from recovering in the present action:—*Held*, by the Court of Appeal, that the defendants were not estopped by the judgment by default recovered in 1891 from setting up the Statute of Limitations; and that the effect of the Statute of Limitations was to extinguish the right to recover the tithe rentcharge where there had been neither payment nor acknowledgment for twelve years; but that the dismiss on the merits in 1896 would not have estopped the plaintiffs. A judgment by default may operate by estoppel; but the ground and extent of that estoppel must be found on the face of the judgment itself, and cannot be inferred or deduced from the pleadings of the party, who has obtained the judgment, where the defendant has said nothing, and has merely allowed the judgment to go by default. An unnecessary averment in a record, that is neither pleaded to nor admitted, cannot be used as an estoppel *Irish Land Commission* v. *Ryan* - - - - - App. 565

—— *Certiorari*—Refusal to grant - 602, 610
See CERTIORARI.

EVIDENCE—Burden of proof—Railway Company—Conditions—Through booking
See CARRIERS. [273

—— Estoppel - - - - - - 565
See ESTOPPEL.

—— Knowledge of right to lateral support 269
See EASEMENT. 1.

—— Lost grant—Presumption—User for less than forty years - - - - - 664
See EASEMENT. 2.

—— Malice - - - - - - - 593
See MALICIOUS INJURY.

—— Public document—Copy—Signed report—Blue Book laid before Parliament—Census—Population of township - 88
See WATERWORKS.

—— Resumption of holding—Building ground
See RESUMPTION OF HOLDING. [262

EXCISE LICENSE—Notice of application—Description of premises - - 388
See LICENSING ACTS. 1.

EXECUTION—*Fieri facias*—Interpleader—Sheriff's fees and expenses—Live stock
See INTERPLEADER. [586

—— Receiver - - - - - - 612
See RECEIVER.

—— Writ of possession—Land Law Acts 136
See ACTION TO RECOVER POSSESSION OF LAND.

FAIR RENT—Separation of mill holding 539
See MILL HOLDING.

—— Tenancy held at—Compulsory purchase 105
See COMPULSORY PURCHASE.

FERÆ NATURÆ—*Animals—Trespass—Rabbits—Deer*—Sic utere tuo ut alienum non laedas.] In the year 1898 *W.* came into possession of a demesne where there were rabbits and deer, which trespassed upon adjoining lands in the occupation of *B.*, doing considerable damage to his crops. *W.'s* predecessor had, on two occasions, let loose foreign rabbits, with a view to the improvement of the breed, and *W.* had, since he entered into possession, trapped the rabbits for profit, and exported them to England, but had done nothing to improve them or increase their numbers. Rabbits bred in considerable numbers on *B.'s* land as well. The deer, which at one time had been confined within a walled deer-park in the demesne, broke loose in the year 1893, through a temporary breach in the wall, and only portion were recaptured. The remainder had since been wandering about the demesne, breeding there, and trespassing continuously on *B.'s* lands, but always returning to the demesne. *W.*, with his friends, occasionally shot the deer for sport; and, in response to *B.'s* complaints, told him that he might shoot them; and, in fact, gave it out generally in the neighbourhood that he desired that anyone who could shoot them might do so. At the same time he kept a wood-ranger, whose duty it was to look after the deer, and his predecessor had occasionally fed the deer in winter time with hay, laurels, and oats:—*Held*, that *W.* was not liable in respect of the damage done by trespass of the rabbits:—*Held* (Boyd, J., *diss.*), that there was evidence to support the finding of the jury that the deer were *W.'s* deer, that they were tame and "kept" by *W.*, and under his control; and that *W.* was liable upon that finding for any damage done by the deer to *B.'s* land and crops. *Brady* v. *Warren* - - - - - - Q. B. 632

FIERI FACIAS—Interpleader—Sheriff's fees and expenses—Live stock - - 586
See INTERPLEADER.

FISHERY ACTS—*Salmon Fishery (Ireland) Act*, 1863 (26 & 27 *Vict. cap.* 114), *ss.* 9, 12—*Certificate of Special Commissioners declaring a weir to be legal, its effect—Free gap—Justices, jurisdiction to convict* (*a*) *for not making legal free gap,* (*b*) *for not maintaining same, notwithstanding order of Special Commissioners of Fisheries certifying the weir and gap to be legal—Judgment* in rem.] *D.* was prosecuted, in 1898, before Justices (under 26 & 27 Vict. c. 114, s. 12), for (*a*) not making a free gap in his weir at Lismore in accordance with the four regulations of s. 9 of that Act; and, (*b*) for not maintaining a free gap therein in accordance with those regulations. *D.* set up as a defence an order dated

FISHERY ACTS—*continued.*
15th February, 1866, of the Special Commissioners, certifying that a free gap had been made therein (in compliance with an undertaking by *D.*), and deciding the said weir to be legal; and *D.* further proved that the free gap had been constructed in accordance with plans approved of by the Commissioners, and had not been in any way altered since 1866. The Justices convicted upon the complaint for not making, their order being silent as to the second complaint (non-maintenance); but stated that they adopted the defendant's view, that if there was a conviction for not making (s. 12, sub-sect. 1) there could not be a conviction for not maintaining (s. 12, sub-sect. 2), "but should the Court be of opinion that we were wrong in so doing, then, in our opinion, a free gap has not been maintained in the following particulars":—1, The gap not being situate in the deepest part of the stream; 2, the sides of the gap not being in a line with and parallel to the direction of the stream at the weir; 3, the bottom of the gap not being at the time of its construction, or since, level with the natural bed of the stream. On case stated on the question, 1, whether the Justices were entitled, on the facts found, to convict for not making a free gap; and, 2, whether upon the facts found, and having regard to the conviction for not making, they were debarred from convicting for not maintaining the free gap:—*Held* (by Palles, C.B., and Andrews, J.; O'Brien, J., dissenting, and Murphy, J., expressing no opinion), that the determination of the Special Commissioners upon the legality or illegality of the weir was a judgment *in rem*, and conclusive against the world; and that, therefore, the conviction for not making a legal free gap was wrong in law; but held *per Curiam*, that (the conviction for not making being reversed as erroneous) the Justices should have convicted the defendants on the complaint for non-maintenance, not upon any finding that the level of the floor of the gap, or its width, were not in accordance with the regulations of section 9 (these having remained unchanged since 1866), but upon the finding of fact that (by reason of the action of the defendant in closing up three hatches on the south wall of the weir) the flow of the stream had been altered, and the sides of the gap, therefore, had not been maintained in a line with and parallel to the direction of the stream at the weir. *Duke of Devonshire, Appellant; Drohan, Respondent* - Q. B. 161

2. —— *Prohibition—Justices, jurisdiction—Case stated* (20 & 21 *Vict. c.* 43)—*Finality of decision of Superior Court—Salmon Fisheries* (*Ireland*) *Acts—Legal free gap—Certificate of Special Commissioners declaring a weir to be legal, its effect.*] *D.* had been convicted before Justices, in 1867, for not maintaining a free gap in his weir at Lismore, and the Justices had, at his request, stated a case for the Court of Queen's Bench upon the question (substantially), whether (having regard to the fact that a free gap had, in 1865, been made in said weir in accordance with the directions of the Fishery Commissioners who, thereupon, in 1866, had certified the weir to be legal, the weir not having since been altered), they had jurisdiction to convict upon proof that the bottom of the gap was, as a fact, higher than the level of the natural bed of the stream. The Queen's Bench having affirmed the conviction, *D.* obtained liberty from the Court of Chancery (Lord O'Hagan, C.) to declare in prohibition against the Justices. To his declaration, Foot, the complainant at Petty Sessions, pleaded the decision of the Queen's Bench as conclusive. To this *D.* demurred, and, the Lord Chancellor having allowed the demurrer:—*Held*, on writ of error to the Exchequer Chamber, that the case was not one for a prohibition, and that the order allowing the demurrer should be reversed. *Duke of Devonshire* v. *Foot* - - - - - EX. CHAM. 211

—— Case stated by Justices—Decision of Superior Court—Finality—Appeal to Quarter Sessions—Prohibition - - - 307
See APPEAL. 2.

—— Master and servant — Liability of fishery owner - - - - - - 391
See MASTER AND SERVANT.

FIXED NET—Free gap—Jurisdiction of Justices - - - - - 161, 211
See FISHERY ACTS. 1, 2.

—— Weekly close time—Liability of owner for act of servant - - - - 391
See MASTER AND SERVANT.

FRANCHISE.
See PARLIAMENT.

FRAUD—Company—Prospectus - - 1
See MISREPRESENTATION IN PROSPECTUS.

FRAUDS, STATUTE OF—*Part performance—Action for breach of contract.*] An agreement was entered into between *C.* and *O'S.*, whereby *O'S.* was to acquire certain premises, with stock-in-trade and book debts, in *B.* wherein business was to be carried on in partnership between them for a period of not less than three years. In pursuance of this agreement the purchase was effected by *O'S.*, with his own money, and thereupon *C.* and *O'S.* entered into possession under the style of *O'B.* & Co. They opened a bank account in that name, and carried on business as partners for a period of seven months. The heads of the agreement were drawn up, but were never signed, and a draft deed of co-partnership passed from one to the other during the seven months, undergoing revision of its details. Finally, *O'S.* refused to execute this deed when called upon by *C.* to do so, whereupon *C.* instituted an action at common law for damages and recovered a verdict for £700:—*Held*, that, the agreement

FRAUDS, STATUTE OF—*continued.*
being one of which a Court of Equity would have had jurisdiction to enforce specific performance, the doctrine of part performance applied to take the case out of the Statute of Frauds, the parol evidence upon which the verdict was founded was properly admitted, and the verdict should be upheld. *Crowley* v. *O'Sullivan* - - - - Q. B. 478

FREE GAP—Weir—Jurisdiction of Justices
See FISHERY ACTS. 1, 2. [161, 211

GAP—Weir - - - - - 161, 211, 391
See FISHERY ACTS. 1, 2.
MASTER AND SERVANT.

GATES—Light railway - - - 341
See TRAMWAY.

GRAND JURY—Solicitor—Compensation for loss of office - - - - - 351
See SOLICITOR.

HAIRDRESSER — "Manual labour" — 38 & 39 Vict. c. 90 - - - - - 714
See WORKMAN.

HIGHWAY—Nuisance—Traction engine
See TRACTION ENGINE. [371, 383

HOLDING — Pasture — Ordinarily used with another holding—Time of user
[417, 422
See LAND LAW (IRELAND) ACTS.

—— Preservation as demesne - - - 465
See DEMESNE LAND.

—— Resumption of - - - - - 262
See RESUMPTION OF HOLDING.

—— Separation—Mill - - - - - 539
See MILL HOLDING.

HOUSE—Lateral support - - - 269
See EASEMENT. 1.

HUSBAND AND WIFE — Judgment against married woman—Debtor's summons 439
See DEBTOR'S SUMMONS.

—— Marriage articles—Interest whether absolute or for life - - - - - 441
See ESTATE FOR LIFE.

IMPLIED COVENANTS—Void subletting by judicial tenant - - - 359, 370
See SUBLETTING.

IMPRISONMENT — Militiaman—Confinement to camp—Franchise - - - 448
See PARLIAMENT. 1.

INCORPORATION OF STATUTE 259, 304
See CROWN RENT.
PERSONATION.

INFANT — *Custody — Mother, right of—Abandonment—Custody of Children Act*, 1891 (54 *Vict. c.* 3).] The father of the infant, who was a farm-labourer, died in 1890, leaving a widow and three children, of whom *H.* was the youngest. The mother, being in poor circumstances, obtained employment as a domestic servant, and placed the

INFANT—*continued.*
children under the care of the Protestant Orphan Society. In October, 1897, the mother was in the service of *M.*, a farmer possessed of a substantial farm in the county of Fermanagh, and on the 5th October, 1897, an agreement in writing was entered into, between the mother and *M.*, that *M.* should adopt the child, and the mother agreed to give the child to *M.*, and to have no claim on her. Shortly afterwards the mother was married again to a small farmer, near *N.*, in the county of Fermanagh. There was no difference of religion between the parties. In the beginning of 1899, the mother demanded the child from *M.*, who refused to give her back, unless he was paid for her support and maintenance. On a motion for a writ of *habeas corpus*, Kenny, J., sitting as Vacation Judge, saw and had a conversation with the child, and was satisfied that she regarded with the strongest aversion the idea of returning to her mother, and held that, having regard to the handing over of the child under the circumstances deposed to, the character of the mother's evidence, as given in her affidavits, and the circumstances and present position of the child, the latter ought not, from the point of view of its own welfare, to be taken from the custody of *M.* :—*Held* by the Court of Appeal (reversing the decision of Kenny, J.), that the mother had not deserted or abandoned the child within the meaning of s. 3 of the Custody of Children Act, 1891, and that she ought to be given into her mother's custody. "The Custody of Children Act, 1891," discussed. *In re O'Hara*
[APP. 232

INHABITANT HOUSEHOLDER — Parliamentary franchise - - - 448
See PARLIAMENT. 1.

—— Nun—Convent - - - - - 455
See PARLIAMENT. 2.

INTERPLEADER—*Sheriff—Fees and expenses—Expenses of keeping live stock—Costs—Liability of successful claimant.*] An interpleader order directed the sheriff to sell certain live stock seized under a writ of *fi. fa.* unless security were given by the claimants. The claimants failed to give security, and the sheriff sold the live stock, and paid the proceeds into Court. The interpleader issues were decided in favour of the claimants:—*Held*, that the sheriff was entitled to be paid out of the fund in Court all costs of the interpleader order, and also all proper expenses of agisting the live stock, but not his fees for executing the writ. *Malone* v. *Ross* - - - - APP. 586

—— Civil bill—Service out of the jurisdiction
[619
See SERVICE OUT OF THE JURISDICTION.

JOINDER—Plaintiffs—Action of libel 265, 268
See LIBEL.

JUDGMENT—Estoppel - 565, 602, 610
See CERTIORARI.
ESTOPPEL.
—— *In rem*—Commissioners of Irish Fisheries
See FISHERY ACTS. 1. [161
—— Married woman—Debtor's summons 439
See DEBTOR'S SUMMONS.
—— Motion for—Action to recover possession for non-payment of rent — Indorsement—Amendment - - - - - 505
See SPECIALLY INDORSED WRIT.
JUDICIAL TENANCY — Compulsory purchase - - - - - - 105
See COMPULSORY PURCHASE.
—— Void subletting—Implied covenants for title
See SUBLETTING. [359, 370
JURISDICTION — Bankruptcy — Arranging debtor — Apprenticeship fee — Compensation - - - - - - 415
See ARRANGING DEBTOR.
—— County Court—Service out of the jurisdiction —Interpleader civil bill - - 619
See SERVICE OUT OF THE JURISDICTION.
—— Justices - - - 105, 161, 211
See COMPULSORY PURCHASE.
FISHERY ACTS. 1, 2.
—— Land Commission - - - - - 259
See CROWN RENT.
—— Quarter Sessions—Appeal—Prohibition 307
See APPEAL. 2.
—— Temporary residence within—Caveator 560
See SECURITY FOR COSTS.
JUSTICES—Case stated—Decision of Superior Court—Effect of - - 211, 307
See APPEAL. 2.
FISHERY ACTS. 2.
—— *Certiorari*—Mistake in law—Estoppel
See CERTIORARI. [602, 610
—— Jurisdiction—Fishery Acts—Free gap
See FISHERY ACTS. 1, 2. [161, 211
—— Jurisdiction under Lands Clauses Act, 1845, s. 121—Judicial tenancy - - 105
See COMPULSORY PURCHASE.
—— Licensing Acts - - - 388, 492
See LICENSING ACTS. 1, 2.
—— Notice of appeal—Service on solicitor 397
See APPEAL. 1.
KNOWLEDGE—Of right to lateral support 269
See EASEMENT. 1.
LAND LAW (IRELAND) ACTS—*Landlord and Tenant—Pasture holding ordinarily used with residential holding—Crucial date at which user must exist—Land Law (Ireland) Act*, 1896, *sect.* 5 (*c*) (ii).] The 5th section of the Land Law (Ireland) Act, 1896, provides that the Land Law Acts shall not apply, amongst others, "to a tenancy in a holding . . . which is let to be used wholly or mainly for the purpose of pasture . . . if the tenant does not actually reside on the holding, or where the holding
LAND LAW (IRELAND) ACTS—*continued.*
adjoins or *is ordinarily used* with another holding, then on the latter holding":—*Held*, by the Court of Appeal (Lord Ashbourne, C., *diss.*), reversing the decision of the Irish Land Commission pronounced by Meredith, J., that the crucial date at which the holding, in respect of which the benefit of the Land Law Acts is sought, must be "ordinarily used" within the meaning of this section, is the date of the passing of the Act of 1896, and not the date of the passing of the Act of 1881. *Gaffney, Tenant; Fetherstonhaugh, Landlord*
[LAND COM. 417; APP. 422
—— Action to recover possession of land—Non-payment of rent—Execution - 136
See ACTION TO RECOVER POSSESSION OF LAND.
—— Judicial tenancy — Compulsory purchase — Mode of ascertaining compensation 105
See COMPULSORY PURCHASE.
—— Subletting without consent—Implied covenants for title - - - 359, 370
See SUBLETTING.
—— Mill included in holding—Separation 539
See MILL HOLDING.
—— Resumption of holding—Building ground—Evidence - - - - - 262
See RESUMPTION OF HOLDING.
—— Sale to tenants—Perpetual Crown rent—Jurisdiction to charge exclusively on unsold lands - - - - - 259
See CROWN RENT.
—— Vesting order—Rentcharge under Arrears Act, 1882 - - - - - - 556
See VESTING ORDER.
LANDLORD AND TENANT—Easement—Presumption of lost grant—Tenants under common landlord—User for less than forty years - - - - - - 664
See EASEMENT.
—— No greater interest than tenant for a year or from year to year—Judicial tenancy 105
See COMPULSORY PURCHASE.
—— Void subletting—Implied covenants for title—Judicial tenancy - - 359, 370
See SUBLETTING.
LANDS CLAUSES ACTS—Judicial tenancy
See COMPULSORY PURCHASE. [105
LATERAL SUPPORT— House—Evidence — Knowledge - - - - - 269
See EASEMENT. 1.
LEVEL CROSSING—Light railway—Gates
See TRAMWAY. [341
LIBEL—*Practice—Joinder of plaintiffs—Separate causes of action—Motion to stay further proceedings—Order XVI., Rule* 1.] Where a libel is published in the same words and in the same document of different persons, they cannot be joined as plaintiffs in one action of libel. *Smurthwaite* v.

LIBEL—*continued.*
Hannay ([1894] A. C. 494) followed; *Booth* v. *Briscoe* (2 Q. B. D. 496) considered and explained. *Peddie* v. *Kyle* - - Q. B. 265; APP. 268

LICENSING ACTS—*Excise licence—Notice of intention to apply for Justices' certificate—Description of premises—3 & 4 Wm. c. 68.*] The Licensing (Ireland) Act, 1833, provides that an applicant for an excise licence certificate must serve a twenty-one days' notice in writing of his intention to apply, therein setting forth the situation and place of the house . . . specifying "the town, townland, parish, barony, half barony, and if in a city or town, the street, square, lane, or other description of place. . ." *R.* served notice of his intention to apply in respect of "his house in Waring-street, Harryville, in the town of Ballymena" (stating also the parish, barony, and county). The application to Quarter Sessions was refused on the ground that the name of the "townland" was not given:—*Held*, that the description was sufficient, and that *mandamus* should issue to the Justices to hear the application. *Reg.* (*Rogers*) v. *Justices of County Armagh* - - - - - - Q. B. 388

2. —— *Licence for sale of intoxicating liquors on or off the premises—Renewal—Certificate of Justices as to "the peaceable and orderly manner in which such house has been conducted during the past year"* (17 & 18 *Vict. c.* 89, *s.* 11)—*Licence lying dormant for consumption "on," but used for consumption "off," the premises—Undertaking given by licensee not to use the license, or to use same in limited manner only—Obligation to supply reasonable refreshment to all comers.*] *D.* & Co., large distillers and wholesale and general family wine and spirit merchants, held for many years an ordinary retail licence for consumption of spirits "on or off the premises" in respect of their place of business in Belfast. Upon their application in 1899 to the Justices of Petty Sessions for a renewal of this licence, objection was made by the officer of police that the premises had not been "conducted" as licensed premises in the past year. Save that some six half-glasses of whiskey had been sold and consumed thereon, there was no evidence of any trade as publicans being carried on by the applicants of supplying the public with intoxicating liquor for consumption *on* the premises; but there was evidence that a large trade was done in sending out and delivering from time to time to customers spirits in quantities between two gallons and two quarts—a trade not covered either by applicants' wholesale licence (43 & 44 Vict. c. 24, ss. 102, 104), or their licence as spirit grocers (8 & 9 Vict. c. 64, s. 1):—*Held*, on application for a *certiorari* to quash the grant of a certificate by the Justices, that, the premises not having been conducted as licensed premises for the consumption of intoxicating liquors *on the premises* during the preceding year, it was not competent to

LICENSING ACTS—*continued.*
the Sessions to grant a certificate as to the peaceable and orderly manner in which same had been conducted, *as licensed premises*, in that period. *Reg.* (*Cox*) v. *Recorder of Dublin* (16 L. R. Ir. 424), and *Reg.* (*Lambe*) v. *Justices of County Armagh* ([1897] 2 Ir. R. 57) applied. *Quære*, as to the liability of a licensed publican to supply reasonable refreshments to all comers? *Reg.* (*Morell*) v. *Justices of County Antrim* Q. B. 492

LIGHT RAILWAY.
See TRAMWAY.

LIMITATIONS, STATUTE OF—Tithe rent-charge—Estoppel - - 565
See ESTOPPEL.

LIVE STOCK—*Fieri facias*—Expense of agistment - - - - - - 586
See INTERPLEADER.

LOAN—Promissory note—Concealment of identity of lender - - - 628, 631
See PROMISSORY NOTE.

LOCOMOTIVE—Traction engine 371, 383
See TRACTION ENGINE.

LOCUM TENENS — Dispensary officer — Vacation - - - - - 547
See VACATION.

LOST GRANT—Presumption—Termors—User for less than forty years - - 664
See EASEMENT. 2.

MALICIOUS INJURY—*To property—Compensation—Breaking into premises where furniture was stored—Malicious Damage Act*, 1861 (24 & 25 *Vict. c.* 97)—*Local Government* (*Ireland*) *Act*, 1898 (61 & 62 *Vict. c.* 37) *sect.* 5.] *B.* was the owner of Gilltown House and demesne in the county of Kildare. The house had been burnt down except the kitchen, where some furniture, including a picture and two mirrors, was stored. *M.*, a military chaplain at the Curragh Camp, obtained leave to bring some of the band boys stationed at the Curragh to the demesne for a day's holiday. Some of the boys strolled over to the building, and from curiosity to see what was in it, smashed open the doors and windows, and five of them entered. One of them in struggling to get out broke the two mirrors:—*Held*, that the acts were malicious, and were punishable as a crime under the Malicious Damage Act, 1861, and therefore the applicant was entitled to the full amount of compensation claimed. *In re Borrowes* - - APP. 593

MARRIED WOMAN.
See HUSBAND AND WIFE.

MASTER AND SERVANT—*Fisheries* (*Ireland*) *Acts*, 1842, 1863 (5 & 6 *Vict. c.* 106 *s.* 40; 26 & 27 *Vict. c.* 114, *s.* 20)—*Weekly close time.*] The occupier of a salmon weir is under a continuous obligation to keep his weir open for the free passage of fish throughout the weekly close time, and cannot, by delegating the performance

MASTER AND SERVANT—*continued.*
of this duty to a servant, escape responsibility. *Hosford* v. *Mackey* ([1897] 2 Ir. R. 292) distinguished. *FitzGerald, Appellant*; *Hosford, Respondent.* - - - - - - Q.B. 391
—— Service franchise - - - - 455
See PARLIAMENT. 2.
MEDICAL OFFICER—Dispensary—Vacation
See VACATION. [547
MERGER—Rentcharge under Arrears Act, 1882—Vesting order - - - 556
See VESTING ORDER.
MILL HOLDING—*Landlord and tenant—Land Law (Ireland) Act*, 1896, *sect.* 5, *sub-sect.* 2—*Character of holding—Mill—Separation of agricultural part from mill portion of premises.*] The holding comprised 113 acres, situate one mile from the town of Nenagh, and was held under a tenancy from year to year, created by parol, subject to the rent of £260 a year. The holding included a large flour mill, which, with the yard and offices attached to it, occupied about two acres. The mill had not been used for a number of years. There was a very good residence on the farm, which was completely separate from the mill portion, and had a separate approach from the county road. There was some evidence to show that the mill might be let separately from the agricultural portion of the holding:—*Held* (reversing the decision of the Land Commission), that a distinct and substantive part of the property was not agricultural or pastoral, and that the separation of the property into two would not, apart from fixing a fair rent, diminish the value of the landlord's interest therein. The Court remitted the case to the Land Commission to make the separation. *Ryan, Tenant*; *O'Brien, Landlord* - APP. 539
MISREPRESENTATON IN PROSPECTUS—*Company—Promoters—Prospectus—Fraud—Misrepresentation and suppression of fact—Companies Act*, 1867, *sect.* 38—*Underwriting—Evidence.*] Where a person subscribes for shares in a Company upon the faith of a prospectus in which the promoters of that Company have as well made actual misrepresentations of material facts that were false to their knowledge as suppressed material facts that were within their knowledge, such person, if he takes no benefit under the contract, and repudiates within a reasonable time after he becomes aware of the fraud, can successfully rely on the fraud of the promoters as a defence to an action by the Company for calls, can rescind his contract, and can recover all moneys paid in respect of the shares subscribed for by him. The omission in a prospectus of the names of the real vendors of the undertaking: and the employment, to conceal their identity, of a nominee as the ostensible vendor, may, if misleading, amount to such fraud as will vitiate the contract. So may also the omission to
MISREPRESENTATION IN PROSPECTUS—*continued.*
state that money was to be spent in underwriting. The measure of the obligation of disclosure, in a Company's prospectus, discussed. Observations on Lindley on Company Law (5th ed.), p. 70. *Components Tube Company, Limited* v. *Naylor* [Q. B. 1
MISTAKE OF LAW — Refusal to grant *certiorari*—Estoppel - 602, 610
See CERTIORARI.
MORTGAGE—Equitable—Shares—Certificates
See ORDER AND DISPOSITION. [153
—— Sale in bankruptcy—Deductions for rent and rates - - - - - - 433
See BANKRUPTCY.
MOTHER—Custody of child - - 232
See INFANT.
MOTION—For judgment—Ejectment for non-payment of rent—Indorsement—Amendment - - - - - - 505
See SPECIALLY INDORSED WRIT.
—— For judgment—Promissory note—Concealment of identity of lender - 628, 631
See PROMISSORY NOTE.
NATIONAL SCHOOL TEACHER — *The National School Teachers (Ireland) Act*, 1879 (42 & 43 *Vict. c.* 74)—*Statute, interpretation—Statutory rules—Power to alter such rules—Delegation of legislative authority* — Ultra vires — *Petition of Right—Costs of the Crown* (23 & 24 *Vict. c.* 34, *s.* 11).] The National School Teachers (Ireland) Act, 1879, created a pension fund for teachers who should elect to accept its benefits in lieu of the gratuities which under the former system they might have been granted on superannuation. This fund consisted of a Parliamentary grant supplemented by contributions or deductions from the teachers' salaries. Under the Schedule Rules (which by s. 11 were to be construed and to have effect as part of the Act) a quarterly deduction of 9*s.* 9*d.* entitled teachers in the suppliant's position to a pension of £88 on retirement at the age of 65. Section 6 provided that all questions of pension should be determined by the Treasury; and s. 11 that the Schedule Rules might "from time to time be revoked, varied, and added to by the Lord Lieutenant with the consent of the Treasury." In 1885, the Lord Lieutenant, with the approval of the Treasury, made new Rules under the Act, reducing the amount of the teachers' contributions. In 1897, finding that the previous bases of calculation in 1879 and 1885 were founded on mistake and error, and that the fund was deficient, the Lord Lieutenant, with Treasury approval, made new Rules increasing the teachers' contributions, in the case of the suppliant and others in the like position, to 17*s.* 11*d.* a quarter. The suppliant objected, and presented a petition of right, alleging a

NATIONAL SCHOOL TEACHER—*continued.*
binding contract in 1879, between the Treasury and the suppliant, that, on the basis of the schedule deductions of 1879, the suppliant should be entitled to a pension of £88 on retirement, and alleging that, unless with his consent, this contract could not be varied, and further that the Rules of 1897 were *ultra vires*. *Held*, that, notwithstanding sect. 6 of the Act, the Court had jurisdiction to entertain the question of the validity of the Rules of 1897, but that these Rules were not *ultra vires*, and that judgment should accordingly be entered for the Crown. *Held*, further (*diss.* Sir P. O'Brien, L.C.J.), that, even under the circumstances, the Court had no discretion to refuse costs against the unsuccessful suppliant. *Ouens* v. *Reg.* Q. B. 513
—— Instalment of salary due—Receiver - 612
See Receiver.
NEW TRUSTEE — Appointment — Vesting of stock—Stamp duty - - - 138
See Trustee.
NON-AGRICULTURAL LANDS — Separation—Land Law (Ireland) Act, 1896, s. 5 (2) - - - - - 539
See Mill Holding.
NOTICE—Act of bankruptcy—Equitable mortgage of shares - - - - 153
See Order and Disposition.
—— Appeal — Conviction by Justices — Notice — Service on solicitor - - - 397
See Appeal. 1.
—— Application for excise licence — Description of premises - - - - 388
See Licensing Acts. 1.
—— Land Law Act, 1887, s. 7 - - 136
See Action to recover Possession of Land.
NOTICE TO TREAT—Form of - - 105
See Compulsory Purchase.
NUISANCE—Highway—Traction engine
See Traction Engine. [371, 383
NUNS—Franchise - - - - 455
See Parliament. 2.
ORDER AND DISPOSITION—*Bankruptcy—Company—Shares—Deposit by owner with bank—Notice of act of bankruptcy—Subsequent adjudication—Irish Bankrupt and Insolvent Act*, 1857, *sect.* 313.] Where an owner of shares in certain Companies deposited the scrip with a bank to secure an advance, without any memorandum in writing or duly executed transfer, and the bank, before adjudication, served notice of such assignment on the Companies, with knowledge, however, of an act of bankruptcy committed by the owner:—*Held*, that where the certificates contained a proviso that they must be produced on registration of the transfer, such shares were not in the order and disposition of the bankrupt; but that where the certificates contained no such proviso, the
ORDER AND DISPOSITION—*continued.*
shares were in the order and disposition of the bankrupt, the notice of transfer not having been served upon the Companies by the bank before becoming aware of the act of bankruptcy. *In re Butler* - - - Q.B. (Bankcy.) 153
ORDERS. GENERAL — 1865 (Probate Contentious) Rr. 115, 116- - - 560
See Security for Costs.
—— 1891, 19th January (Supreme Court) III. R. 6 - - - - - - 505
See Specially indorsed Writ.
—— —— XIV., R. 1 - - - - - 505
See Specially indorsed Writ.
—— —— XVI., R. 1 - - - - - 265
See Libel.
—— —— XXIX., R. 4 - - - - - 560
See Security for Costs.
—— 1897, 22nd November (National School Teachers) - - - - - 513
See National School Teacher.
—— 1898, 22nd December (County Boroughs Elections), Clause 23 - - - 304
See Personation.
—— —— Dispensary Districts, Art. 28 - 547
See Vacation.
—— 1899, February 12th (Privy Council—Election petitions), R. 12 - - - - 384
See Election Petition.
PARLIAMENT—*Franchise—Inhabitant householder—Compulsory absence during part of the qualifying period—Militia sergeant—Imprisonment—Confinement to camp for military offence—54 Viet. c.* 11.] A sergeant in a militia regiment, ordinarily resident in Londonderry, while on training with his regiment at Buncrana, was sentenced to be a prisoner at large for forty-eight hours on a charge of drunkenness. The effect of the sentence was that he was not allowed outside the camp lines during the period. *Held*, that he was not thereby disqualified as an inhabitant occupier in respect of his residence in Londonderry. *O'Connell* v. *Holland*. - - - - App. 448
2. —— *Franchise—Inhabitant occupier—Convent — Nuns — Service franchise — Office, service, or employment.*] The claimants were nuns residing at a convent in the town of *E*. Each of them occupied a separate bedroom, and was subject to the control of the Lady Superioress, who could at any time change the occupants from one room to another, or arrange to have more than one occupant of a single room. She could refuse to allow a nun to receive a visitor in her room, demand admission to the room, and require the nuns to give up the keys. The nuns took their meals together in the Refectory, and occupied in common other general rooms in the convent: they received no remuneration, and were under no contract of employment. The premises were vested in the

PARLIAMENT—*continued.*
Roman Catholic Bishop of Clogher, the parish priest, and the senior curate of *E.*, all for the time being, upon trust for the benefit of the Roman Catholic inhabitants of *E.* The convent was governed by rules subject to the supreme authority of the Bishop:—*Held*, that the nuns were not inhabitant occupiers of separate dwellings within the meaning of s. 3 of the Representation of the People Act. *Semble*, the nuns did not occupy their rooms by virtue of any office, service, or employment. *Bannon* v. *Hanrahan* - - App. 455

PARTIES—Joinder—Plaintiffs—Libel - 265
See Libel.

PART PERFORMANCE—Statute of Frauds
See Frauds, Statute of. [478

PASTORAL HOLDING—Ordinarily used with another—Time of user - 417, 422
See Land Law (Ireland) Acts.

PERSONATION—*Criminal law—Felony—Misdemeanour—Local Government (Ireland) Act*, 1898 *—Election of county councillors—Statute—Incorporation.*] The prisoner was indicted before Palles, C.B., at the Commission of Oyer and Terminer for Dublin city, held on the 3rd February, 1900, for that he did unlawfully personate and falsely assume to vote in the name of another person at an election for a county councillor for the borough of Dublin on the 15th January, 1900, the count concluding "against the statute and against the peace." In a second count he was indicted for an attempt to commit the said offence. *Held*, that the first was a good count by statute, and, *semble*, would have been good at common law. *Reg.* v. *Clarke* [Palles, C. B. 304

PETITION—County Council election—Costs of returning officer - - - 384
See Election Petition.
—— Of right—Costs of the Crown - - 513
See National School Teacher.

POPULATION—Township—Evidence—Census Act, 1880 - - - - - 88
See Waterworks.

POWER—Appointment of new trustee—Stamp
See Trustee. [138

PRACTICE—Action to recover possession of land—Non-payment of rent—Execution—Land Law Acts - - - 136
See Action to recover Possession of Land.
—— Action to recover possession of land—Non-payment of rent—Indorsement—Amendment - - - - - - 505
See Specially indorsed Writ.
—— Appeal from Justices—Notice of—Service on solicitor - - - - - 397
See Appeal. 1.

PRACTICE—*continued.*
—— Bankruptcy—Judgment against married woman—Debtor's summons - 439
See Debtor's Summons.
—— Bankruptcy—Sale—Mortgaged property—Deductions - - - - - 433
See Bankruptcy.
—— Case stated—Justices—Decision of Superior Court upon—Appeal to Quarter Sessions
See Appeal. 2. [307
—— *Certiorari*—Refusal to grant—Mistake of law
See Certiorari. [602, 610
—— Costs—Municipal election petition—Returning officer - - - - - - 384
See Election Petition.
—— Costs—Petition of right - - - 513
See National School Teacher.
—— Costs—Security for—Caveator—Commencement of probate action—Temporary residence within jurisdiction—Costs of motion
See Security for Costs. [560
—— Interpleader—Civil bill—Service out of the jurisdiction - - - - - 619
See Service out of the Jurisdiction.
—— Interpleader—Sheriff—Costs, fees, and expenses—Agistment of live stock 586
See Interpleader.
—— Parties—Joinder—Plaintiffs—Libel 265
See Libel.
—— Poor Law—Dispensary—Medical officer—Vacation - - - - - - 547
See Vacation.
—— Prohibition - - - - - - 307
See Appeal. 2.
—— Receiver—National schoolmaster's salary—Instalment due - - - 612
See Receiver.

PRESCRIPTION—Lateral support—Knowledge—Evidence - - - - - 269
See Easement. 1.
—— Watercourse—Artificial channel
See Easement. 2. [325, 340, 664
Watercourse.

PRESUMPTION—Lost grant—User for less than forty years - - - - - 664
See Easement. 2.

PROMISSORY NOTE—*Loan—Concealment of identity of lender—Borrower's right to repudiate.*] *O'K.* borrowed £135 from a money lender whose real name was *L.*, but who on the occasion of the loan described himself as carrying on business as *C. O'K.* passed his promissory note, payable to *C.* for £200, whereof £65 represented interest on the loan. The loan was repayable by four instalments of £50 each, with the condition that upon default in payment of any one instalment the entire balance then due on foot of the note was to become payable at once. *O'K.* made default in payment of the third instalment, whereupon an action was brought

PROMISSORY NOTE—*continued.*
against him by *L.*, trading as *C.*, for £100, being the amount of the two remaining instalments. Upon motion for final judgment, it appeared that *O'K.* must have been aware that *C.* was trading under a fictitious name, although he swore that he did not know that the real lender was *L.* He further swore that he would not have borrowed the money if he had known that the real lender was *L.*, whom he knew to be an exacting money lender:—*Held*, that *O'K.* should be at liberty to defend the action on the terms of lodging in Court within a week the balance due of the principal sum advanced with interest at 5 per cent. to abide the further order of the Court, the costs of both parties in that event to be costs in the cause, but in default of so doing the plaintiff should have judgment with costs. *Gordon* v. *Street* ([1899], 2 Q. B., 641), followed. *Levin* v. *O'Keeffe* Q. B. 628; APP. 631

PROMOTERS—Company—Fraud—Suppression of material facts - - - - 1
See MISREPRESENTATION IN PROSPECTUS.

PROSPECTUS — Fraudulent misrepresentation and suppression - - - - 1
See MISREPRESENTATION IN PROSPECTUS.

PUBLIC DOCUMENT — Census, 1880 — Evidence - - - - - 88
See WATERWORKS.

PUBLIC HOUSE—Obligation to supply refreshment—Dormant licence - - 492
See LICENSING ACTS. 2.

QUARTER SESSIONS—Appeal—Prohibition
See APPEAL. 2. [307
—— Appeal—Service - - - - - 397
See APPEAL. 1.

QUIT RENT.
See CROWN RENT.

RABBITS—Trespass - - - 632
See FERÆ NATURÆ.

RAILWAY COMPANY—Light railway 341
See TRAMWAY.
—— Through booking—Conditions - 273
See CARRIERS.
——Watercourse—Artificial channel—Prescription
See WATERCOURSE. [325, 340

RATES—Sale in bankruptcy—Mortgaged property—Deductions - - - 433
See BANKRUPTCY.

RECEIVER — *Equitable execution — National schoolmaster—Instalment of salary actually due—Public policy.*] The Court has jurisdiction to appoint a receiver over an instalment of a National schoolmaster's salary which has actually become due. It is not against public policy that an instalment of such a salary, when actually due, should be liable to execution. *Picton* v. *Cullen* APP. 612

RELEASE—Vesting order—Rentcharge under Arrears Act, 1882 - - - 556
See VESTING ORDER.

RENEWAL OF LICENCE—Justices' certificate—Licence dormant for consumption on the premises - - - - - 492
See LICENSING ACTS. 2.

RENT—Payable to the Crown—Exclusive charge—Crown Lands Act, 1894, s. 12 259
See CROWN RENT.
—— Sale in bankruptcy—Mortgaged property—Deductions - - - - 433
See BANKRUPTCY.

RENTCHARGE—Arrears of Rent Act, 1882—Vesting order - - - - 556
See VESTING ORDER.
—— Tithe rentcharge - - - 565
See ESTOPPEL.

RESUMPTION OF HOLDING—*Landlord and tenant—Land Law (Ireland) Acts*, 1881–1896—*Resumption of holding—Building ground—Evidence.*] A landlord, applying for resumption, must satisfy the Court that he has a clear, settled, and definitive purpose of converting the agricultural lands which he is desirous to resume, and which are suitable for building, into building ground if and when the order for resumption has been made. *Archbold, Tenant; Charters, Landlord*
[LAND COM. 262

RETURNING OFFICER—Municipal election petition—Costs - - - 384
See ELECTION PETITION.

REVENUE—Crown rent—Exclusive charge 259
See CROWN RENT.
—— Estate duty—"Settled property" 281, 400
See ESTATE DUTY.
—— Stamp duty—Appointment of new trustee
See TRUSTEE. [138

SALARY—National schoolmaster — Instalment due—Receiver - - - 612
See RECEIVER.

SCHOOLMASTER.
See NATIONAL SCHOOL TEACHER.

SECURITY FOR COSTS—*Practice—Defendant caveator—Permanent residence out of jurisdiction—Temporarily resident within the jurisdiction—Commencement of action—"Plaintiff"—Probate Rules (Contentious)* 1865, 115, 116; *Rules of Supreme Court (Ireland)* 1891, *Order XXIX., Rule* 4.] A defendant caveator who is ordinarily resident outside the jurisdiction, but who is temporarily within the jurisdiction, cannot be called on to give security for costs under Order XXIX., Rule 4, of the Rules of 1891. The word "plaintiff" in that rule does not include a defendant caveator in a Probate action. It is premature to apply for an order for

SECURITY FOR COSTS—*continued.*
security for costs before the issuing of a writ of summons asking for a grant of probate of the alleged will. Circumstances under which a defendant caveator, though successful in resisting an application for security for costs, may be ordered to pay the costs of the motion. *In the Goods of Twomey; O'Leary* v. *Stack* Q. B. (Prob.) 560

SERVANT.
See Master and Servant.

SERVICE FRANCHISE - - 455
See Parliament. 2.

SERVICE OUT OF THE JURISDICTION—*County Court—Practice—Interpleader—Civil Bill Act*, 1851 (14 & 15 *Vict. c.* 57, *sect.* 150.] The County Court has no jurisdiction to pronounce a decree upon an interpleader process, the service of which was effected upon the defendant at his residence in England. *Spence* v. *Parkes* - Q. B. 619

SETTLEMENT—Appointment of new trustee—Stamp - - - - - 138
See Trustee.

—— Marriage articles—Interest whether absolute or for life - - - - 441
See Estate for Life.

SHAREHOLDER—Company—Equitable mortgage—Form of certificate - 153
See Order and Disposition.

—— Company—Fraudulent prospectus - 1
See Misrepresentation in Prospectus.

SHERIFF—Interpleader—Costs, fees and expenses - - - - - 586
See Interpleader.

SOLICITOR—*Local Government* (*Ireland*) *Act*, 1898 (61 & 62 *Vict. c.* 37) *sects.* 109, 115, *and Schedule* vii.—*Compensation to "existing officers"—"County solicitor"—Solicitor for a Grand Jury.*] The solicitor for the Grand Jury of a county is the "county solicitor" referred to in section 115 of the Local Government (Ireland) Act, 1898, and entitled, upon dismissal for some other cause than misconduct or incapacity, to compensation under that Act for loss of office. *Reg.* (*Brown*) v. *County Council of County Wicklow* - - Q. B. 351

—— Service on—Notice of appeal from justices
See Appeal. [397

SPECIALLY INDORSED WRIT—*Ejectment for non-payment of rent—Motion for final judgment—Amendment of indorsement—R. S. C. I., Order XIV., Rule* 1, *Order III., Rule* 6.] In an action to recover possession of land for non-payment of rent, *W. F. G.* as plaintiff, against *J. C.* as defendant, the indorsement of the writ stated that the plaintiff's claim was to recover possession of the house No. 13 M. Square, Dublin, and that one year's rent was due, £90. On a motion for final judgment, leave was given to the plaintiff to amend the writ, and to sign final judgment for recovery of possession, with costs of the action and of the motion. The indorsement of the writ as amended stated that the plaintiff claimed to recover possession of the house No. 13 M. Square, Dublin, held from the plaintiff's predecessor under lease dated the 13th October, 1882, made between *W. N. G.* and *E. C.* at the rent of £90, that one year's rent was due, of which the particulars were given, and that all the lessor's interest was vested in the plaintiff. *Held* (reversing the decision of Boyd, J.), that the writ as amended was not specially indorsed; and *Held*, also by FitzGibbon, Walker, and Holmes, L.JJ., that the plaintiff should not have been allowed, at the time of moving for judgment, to amend so as to change an ordinary writ into a specially indorsed writ. *Guinness* v. *Caraher* - - - - - - App. 505

STAMP—Appointment of new trustee - 138
See Trustee.

STATUTE OF FRAUDS.
See Frauds, Statute of.

STATUTE OF LIMITATIONS.
See Limitations, Statute of.

STATUTES:—
2 & 3 Wm. 4, c. 71—Prescription - 664
See Easement. 2.
3 & 4 Wm. 4, c. 27—Limitations, s. 34 565
See Estoppel.
3 & 4 Wm. 4, c. 68—Licensing, s. 2 - 388
See Licensing Acts. 1.
5 & 6 Vict. c. 94—Defence - - 105
See Compulsory Purchase.
5 & 6 Vict. c. 106—Fisheries, s. 40 - 391
See Master and Servant.
8 Vict. c. 18—Lands Clauses - - 105
See Compulsory Purchase.
8 Vict. c. 20—Railways Clauses - 325, 340
See Watercourse.
14 & 15 Vict. c. 57—Civil bills, s. 150 - 619
See Service out of the Jurisdiction.
14 & 15 Vict. c. 93—Petty Sessions, s. 25 (5)
See Appeal. 1. [397
14 & 15 Vict. 99—Evidence, s. 14 - 88
See Waterworks.
20 & 21 Vict. c. 43—Justice of the Peace, s. 6
See Fishery Acts. 2. [211
—— —— ss. 6, 14 - - - - - 307
See Appeal. 2.
20 & 21 Vict. c. 60—Bankruptcy, s. 313 153
See Order and Disposition.
—— —— s. 353 - - - - - 415
See Arranging Debtor.
21 & 22 Vict. c. 72—Landed Estates, s. 68 259
See Crown Rent.
23 & 24 Vict. c. 34—Petition of right, s. 11
See National School Teacher [513
23 & 24 Vict. c. 106—Lands Clauses - 105
See Compulsory Purchase.

STATUTES—*continued.*
23 & 24 Vict. c. 112—Defence - - 105
See COMPULSORY PURCHASE.
23 & 24 Vict. c. 154—Landlord and Tenant, ss. 1, 41 - - - 359, 370
See SUBLETTING.
24 & 25 Vict. c. 70—Locomotives 371, 383
See TRACTION ENGINE.
24 & 25 Vict. c. 97—Malicious damage 593
See MALICIOUS INJURY.
26 & 27 Vict. c. 114—Fisheries, ss. 2, 3, 7 211
See FISHERY ACTS. 2.
—— —— ss. 9, 12 - - - - - 161
See FISHERY ACTS. 1.
—— —— s. 20 - - - - - 391
See MASTER AND SERVANT.
28 & 29 Vict. c. 83—Locomotives 371, 383
See TRACTION ENGINE.
29 & 30 Vict. c. cclxi.—Bray Township 88
See WATERWORKS.
30 & 31 Vict. c. 131—Companies, s. 38 - 1
See MISREPRESENTATION IN PROSPECTUS.
37 & 38 Vict. c. 57—Limitations, s. 1 - 565
See ESTOPPEL.
38 & 39 Vict. c. 90—Employers and Workmen, s. 10 - - - - - - 714
See WORKMAN.
42 & 43 Vict. c. 74—National School Teachers
See NATIONAL SCHOOL TEACHER. [513
43 & 44 Vict. c. 28—Census, 1880 - 88
See WATERWORKS.
44 & 45 Vict. c. 49—Land Law, ss. 2, 5
See SUBLETTING. [359, 370
—— —— s. 5 - - - - - 262
See RESUMPTION OF HOLDING.
—— —— ss. 5, 8, 13 - - - 105
See COMPULSORY PURCHASE.
—— —— s. 7 - - - - - 136
See ACTION TO RECOVER POSSESSION OF LAND.
45 & 46 Vict. c. 47—Arrears of rent, s. 16 556
See VESTING ORDER.
48 Vict. c. 3—Representation of the people, s. 3
See PARLIAMENT. 2. [455
48 & 49 Vict. c. 73—Purchase of land, s. 10
See CROWN RENT. [259
50 & 51 Vict. c. 48—Land Law, s. 15 - 259
See CROWN RENT.
54 Vict. c. 11—Electoral Disabilities Removal
See PARLIAMENT. 1. [448
54 & 55 Vict. c. 3—Custody of children 232
See INFANT.
54 & 55 Vict. c. 39—Stamps - - 138
See TRUSTEE.
STATUTES—*continued.*
57 & 58 Vict. c. 30—Finance, s. 5, sub-s. 2
See ESTATE DUTY. [281, 400
57 & 58 Vict. c. 43—Crown lands, s. 12 259
See CROWN RENT.
59 & 60 Vict. c. 47—Land Law, s. 5 (1), (*b*) ii
See DEMESNE LAND. [465
—— —— s. 5 (1), (*e*) (ii) - 417, 422
See LAND LAW (IRELAND) ACTS.
—— —— s. 5 (2) - - - - - 539
See MILL HOLDING.
—— —— s. 12 - - - - - 136
See ACTION TO RECOVER POSSESSION OF LAND.
61 & 62 Vict. c. 37—Local Government, s. 5
See MALICIOUS INJURY. [593
—— —— s. 30 - - - - - 547
See VACATION.
—— —— ss. 109, 115, Schedule vii - 351
See SOLICITOR.

SUBLETTING—*Landlord and tenant—Landlord and Tenant (Ireland) Act*, 1860 (23 & 24 *Vict. c.* 154) *sects.* 1, 41—*Lease—Implied covenant for title and quiet enjoyment—Land Law (Ireland) Act*, 1881 (44 & 45 *Vict. c.* 49), *sects.* 2, 5—"*Judicial tenancy*"—*Subletting without consent.*] Upon a subletting inoperative by reason of the absence of the landlord's consent, no covenant for title or quiet enjoyment can be implied under section 41 of the Landlord and Tenant (Ireland) Act, 1860. *Canavan* v. *Burton*
[Q. B. 359; APP. 370

THROUGH BOOKING - - - 273
See CARRIERS.

TIME—User of pastoral with another holding—Land Law (Ireland) Act 1896, s. 5, (cxii) - - - - 417, 422
See LAND LAW (IRELAND) ACTS.
—— Vacation Medical officer of dispensary 547
See VACATION.

TITHE RENTCHARGE—Civil bill dismiss on merits—Estoppel - - - 565
See ESTOPPEL.
—— Order of justices—*Certiorari*—Estoppel
See CERTIORARI. [602, 610

TITLE—Implied covenants—Void subletting
See SUBLETTING. [359, 370

TOWNLAND—Omission of—Application for excise license—Notice - - 388
See LICENSING ACTS. 1.

TOWNSHIP—Water supply—Population—Evidence - - - - - - 88
See WATERWORKS.

TRACTION ENGINE—*Locomotives Acts*, 1861, 1865 (24 & 25 *Vict. c.* 70; 28 & 29 *Vict. c.* 83)—*Nuisance—Highway.*] The defendant was the owner

TRACTION ENGINE—*continued.*
of a steam traction-engine. Whilst being driven by the defendant's servants along the streets of *K.*, it injured the water and sewer-pipes of the plaintiffs (the urban sanitary authority) laid beneath the street. It was admitted that there was no negligence in the management of the machine, and that the engine was constructed in conformity with the Locomotives Acts, 1861 and 1865. It was, however, found as a fact that the plaintiffs' pipes were laid at a depth below the surface of the streets sufficient to protect them from injury by ordinary traffic, but not sufficient to protect them from injury by the defendant's traction-engine. The plaintiffs sued the defendant for damages in the County Court; and on case stated by the Judge of Assize:—*Held*, that the defendant was liable upon the ground that a traction-engine being exceptionally calculated to inflict such damage, and injury having resulted from its use that would not have resulted from ordinary traffic, the defendant was liable in damages for such injury, and that the Locomotives Acts did not restrict his liability. *Guardians Armagh Union* v. *Bell* - - Q. B. 371; App. 383

TRAMWAY — *Railways Clauses Acts — Tramways (Ireland) Acts — "Light railway"—Level crossing—Gates—Duty to employ persons to open and shut such gates.*] A light railway (or tramway) constructed under the Tramways (Ireland) Acts is not subject to the regulations as to gates and persons in charge at level crossings imposed by the Railways Acts. In the case of such light railway or tramway the obligation in this respect is that imposed by the Tramways (Ireland) Acts and by the terms of the Order in Council and Grand Jury Presentment authorizing the undertaking. *Gorman* v. *Waterford & Limerick Railway Company* Q. B. 341

TRESPASS—Rabbits—Deer - - 632
See Feræ Naturæ.

TRUSTEE — *Appointment of new trustees of a settlement—Sale of lands included in the settlement—Re-investment of the proceeds in stock*—Ad valorem *duty as on a settlement—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39.)] A portion of certain lands, subject to the trusts of a marriage settlement executed in 1870, was, in exercise of a power contained in the settlement, sold and the proceeds invested in the purchase of stock:—*Held*, that a deed appointing a new trustee of the settlement, and vesting in the new and continuing trustee the property, subject to the trusts of the settlement, including therein the stock above-mentioned, is not a settlement within the meaning of the definition of the word "settlement" in the schedule to the Stamp Act, 1891. *Viscount Massereene and Ferrard, Appellant; Commissioners of Inland Revenue, Respondents* [Q. B. 138

ULTRA VIRES — Statutory rules — National school teacher - - - 513
See National School Teacher.

UNDERTAKING—To use license in restricted manner - - - - - 492
See Licensing Acts. 2.

USER—Tenants of common landlord - 664
See Easement. 2.

VACATION—*Medical officer—"Not exceeding"—"Allowed" — Guardians — Local Government Board — Local Government (Ireland) Act*, 1898 (61 & 62 *Vict. c.* 37)—*General Rules for the Government of Dispensary Districts, Article* 28.] Article 28 of the General Rules of the Local Government Board for the Government of Dispensary Districts, does not entitle a medical officer to a full four weeks vacation in the year. The Board of Guardians is the proper authority to fix the length of the vacation, not exceeding four weeks, and the Local Government Board, while it may withhold approval of the arrangement made under which the medical officer is about to relinquish his duties, cannot fix a period of vacation different from that already fixed by the Guardians. The approval of the Local Government Board of a period of vacation, longer than that allowed by the Guardians, does not entitle the *locum tenens* appointed under the arrangement to remuneration for the longer period. *Henry* v. *Guardians of Antrim Union* - - Q. B. 547

VESTING—Stock—New trustees—Stamp duty
See Trustee. [138

VESTING ORDER—*Arrears of Rent (Ireland) Act*, 1882 (45 & 46 *Vict. c.* 47, *s.* 16)—*Rentcharge—Purchase of Land (Ireland) Acts—Merger.*] An order of the Irish Land Commission, under the Purchase of Land (Ireland) Acts, purporting to vest the lands in the tenant in fee-simple, subject to an impropriate tithe-rentcharge, but freed from all other charges, does not release the lands from a then existing rentcharge created under the 16th section of the Arrears of Rent (Ireland) Act, 1882. *Irish Land Commission* v. *O'Flaherty* Q. B. 556

WASTE—Water supply - - - 88
See Waterworks.

WATERCOURSE — *Easement — Watercourse—Prescription—Railway company—Claim to the enjoyment of water flowing in an artificial channel along a railway company's permanent way.*] Prior to 1849 the plaintiff's predecessors had enjoyed the right to take water from a natural stream flowing near their holding. In 1849, the defendant railway company, in the course of the construction of their line, interfered with or tapped the subterranean sources of this stream which ceased thenceforward to flow, the water that had supplied it finding its way to the surface at a cutting on the company's line. This water the company conveyed

WATERCOURSE—*continued.*
along and away from their line in a new artificial channel. The water of this new stream was not until 1898 used by nor was it of any use to the company. In 1898 the company commenced to make use of this water supply for their own purposes, and the plaintiff, who had been taking the water thereof since 1849 for domestic purposes, brought an action for disturbance of a prescriptive right. The jury found that the new stream was substituted for the old, and that the company had not constructed the new channel until they should require to use the water for their own purposes. On new trial motion :—*Held*, that this new artificial watercourse being made for the benefit of the company on the company's own land, no enjoyment of the water thereof while the water was of no use to the company could create a prescriptive right in the plaintiff; and, further, that the existence of such a right would be inconsistent with the purposes of the incorporation of the company, and with the obligations of the company to provide for the security of their permanent way and the safety of the public; and that, the new artificial stream not being the same as the stream formerly in existence, no contract in regard thereto, as an "accommodation work" within section 16 of the Railway Clauses Act, 1845, could be presumed. *M'Evoy* v. *Great Northern Railway Company*
[Q. B. 325; APP. 340

—— Prescription—Tenants under common landlord - - - - - - 664
See EASEMENT. 2.

WATERWORKS — *Dublin Corporation — Bray Township—Waterworks, supply—Evidence—Public document—Census—Census Act*, 1880 (43 & 44 *Vict. c.* 28).] By the Bray Township Act, 1866 (29 & 30 Vict. cap. cclxi), the Corporation of Dublin are bound to supply, from the "Vartry" waterworks, the Bray Township with 20 gallons of water per head of the population of the township, the water to be supplied at a certain "head" or pressure; the Township Commissioners supplying regulating valves at the point of delivery. Bray Township comprises "Big Bray" (in county Wicklow), and "Little Bray" (in county Dublin). By Provisional Order (confirmed by statute) in 1874, Bray Township might demand and pay for (and the Corporation of Dublin supply) excess water at a certain rate per gallon; but "Little Bray" was excluded from the effect of this enactment until a "special resolution" was passed by the inhabitants. This Order (and statute) still omitted to provide any mode of calculating the population, and the omission was remedied in a Provisional Order (and confirmatory statute) in 1885, by which the calculation of population was to be based on the "last census," and "last preceding census." By the Dublin Corporation Act, 1897 (60 & 61 Vict. cap. cxxi) a

WATERWORKS—*continued.*
meterage system was provided; and it was made compulsory on Bray Township to pay for all excess water supplied, it being enacted that, in calculating the statutory supply (20 gallons per head), 30 per cent. should be added to the population, ascertainable as above mentioned. This Act, however, likewise did not apply to "Little Bray," until a "special resolution should be passed." No such "special resolutions" were ever passed by the inhabitants of Little Bray. The Dublin Corporation sued the Commissioners of Bray Township for £511 4*s.* 7*d.* excess supply of water to "Big Bray" ("Little Bray" having concededly no powers to pay for any excess). This amount was calculated by ascertaining, on the census returns, the population of Big Bray, adding 30 per cent. thereto, and working out the excess, at the rate per gallon specified in the Order of 1874, over the normal supply of 20 gallons per head per day. The defendants lodged £427 in Court in satisfaction of the plaintiffs' claim, alleging that, to ascertain the correct amount, 30 per cent. should be first added to the combined population of "Big" and "Little" Bray, as one unit; that from the sum should be then deducted the actual population of "Little Bray"; and that the excess over the normal supply should be calculated upon the difference. *Held* (on new trial motion), that the basis of calculation contended for by the plaintiffs was correct; that they were entitled to judgment for the full amount claimed; and that alleged waste, owing to over-pressure on the valves at the point of delivery, could not be taken into consideration. The Census Act (Ireland), 1880, containing no provision similar to that to be found in sect. 11 of the Census Act (Ireland), 1890, the plaintiffs, to prove the census and population of Bray in 1880, called one of the Census Commissioners who produced the original draft general report signed by the Census Commissioners of that year, and a print (Blue Book) of the "Abstract" laid by them before Parliament. *Held* that, either as originals, or as examined copies of public documents (within Lord Brougham's Act, 14 & 15 Vict. c. 99, s. 14), these were properly admitted in evidence. *Dublin Corporation* v. *Bray Township Commissioners* Q. B. 88

WEIR.
See FIXED NET.

WORDS—"Accommodation work"—Railways Clauses Act, 1845, s. 16 - 325, 340
See WATERCOURSE.

—— "Allowed"—Art. 28 Dispensary District Rules - - - - - - 547
See VACATION.

—— "County solicitor"—Local Government Act, 1891, s. 115 - - - - 351
See SOLICITOR.

WORDS—*continued.*
—— "Manual labour"—38 & 39 Vict. c. 90, s. 10
See WORKMAN, [714
—— "No greater interest than as tenant for a year or from year to year—Lands Clauses Act, 1845, s. 121 - - - - 105
See COMPULSORY PURCHASE.
—— "Not exceeding"—Art. 28 Dispensary District Rules - - - - - 547
See VACATION.
—— "Plaintiff"—R. S. C. I. (1891) Order XXIX. R. 4 - - - - - - - 560
See SECURITY FOR COSTS.
—— "Settled property"—57 & 58 Vict. c. 30
See ESTATE DUTY. [281, 400
—— "Settlement"—54 & 55 Vict. c. 39 138
See TRUSTEE.

WORKMAN — *Hairdresser — Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90.)] A hairdresser is not a "workman" engaged in manual labour within sect. 10 of the Employers and Workmen Act, 1875. *Reg.* (*Holywood*) v. *Justices of County Louth* - - - - Q. B. 714

WRIT OF POSSESSION—Land Law Acts 136
See ACTION TO RECOVER POSSESSION OF LAND.

WRIT OF PROHIBITION—Quarter Sessions —Appeal - - - - - 307
See APPEAL. 2.

WRIT OF SUMMONS — Indorsement — Amendment - - - - - 505
See SPECIALLY INDORSED WRIT.

THE END.

BIBL.
LONDIN.